89- 1413

No. _____

In the Supreme Court of the United States

October Term, 1989

DONACIANO HERNANDEZ-ESCARSEGA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

BARRY TARLOW
Law Offices
A Professional Corporation
9119 Sunset Boulevard
Los Angeles, California 90069
Telephone: (213) 278-2111

Attorneys for Petitioner
DONACIANO HERNANDEZ-ESCARSEGA

Westside Law Publishers Los Angeles, California (213) 477-0491

I.

QUESTIONS PRESENTED FOR REVIEW

1. A juror claimed that she received a sign from God confirming that petitioner was guilty and that a dissenting juror would change his not guilty vote. The sign from God was manifested by the dissenting juror's decision to wear a blue blazer to court on the final day of deliberations. Petitioner contends that the sign from God constituted an improper extra-judicial influence on the guilt determination process.

2. The district court refused to give an instruction requiring the jury to agree unanimously on the three felonies comprising the "continuing series of violations" element of the continuing criminal enterprise offense. Ignoring contrary authority from the Third Circuit, the Court of Appeals found no error in the district court's refusal to give this specific unanimity instruction. Petitioner contends that the instruction was required in order to preserve his right to a unanimous verdict on the essential elements of the offense.

3. The district court instructed the jury that the forfeiture allegations of the continuing criminal enterprise count need only be established by a preponderance of the evidence and did not require proof beyond a reasonable doubt. Petitioner contends that this instruction improperly reduced the government's burden of proof in a criminal forfeiture proceeding.

TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED

Statutes

Other Sources

No. _____

In the Supreme Court of the United States

October Term, 1989

DONACIANO HERNANDEZ-ESCARSEGA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

The petitioner in this case, Donanciano Hernandez-Escarsega, petitions for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

II.

JURISDICTION

The opinion of the Court of Appeals, affirming petitioner's conviction on various marijuana-related offenses, was filed on October 4, 1989. A timely petition for rehearing was denied on January 5, 1990. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

III.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Article I, section 9, clause 3 of the United States Constitution, the Fifth and Sixth Amendments to the Constitution, Rule 606(b) of the Federal Rules of Evidence, and Title 21, United States Code, section 853, are set forth verbatim in the attached appendix. Appendix at A1-4.

IV.

PROCEDURAL HISTORY OF THE CASE

On August 20, 1986, following an eighteen-day jury trial in the United States District Court for the Southern District of California, petitioner Donaciano Hernandez-Escarsega ("Hernandez") was convicted of engaging in a continuing criminal enterprise and related conspiracy offenses involving the importation of marijuana. On October 24, 1986, District Judge J. Lawrence Irving sentenced Hernandez to 40 years in custody on the CCE count and to lesser concurrent terms on the conspiracy counts. Judge Irving also imposed a $100,000 fine and entered a judgment of criminal forfeiture in accordance with special verdicts returned by the jury.

Hernandez appealed his conviction and the forfeiture judgment to the United States Court of Appeals for the Ninth Circuit. The appeal was argued and taken under submission on February 5, 1988. On June 17, 1988, the court entered an order withdrawing submission of the case and directing the parties to file supplemental briefs. The briefs were filed and the case was ordered re-submitted as of September 22, 1989. On October 4,

1989, the court entered judgment affirming Hernandez's CCE conviction and vacating the sentences on the conspiracy counts. *United States v. Hernandez-Escarsega*, No. 86-5320 (9th Cir., October 4, 1989).[1] A combined petition for rehearing and suggestion for rehearing en banc was denied on January 5, 1990.[2]

[1]A copy of the court of appeals opinion is included in the appendix to this petition. Appendix at A5-50.

[2]A copy of the order denying the petition for rehearing and suggestion for rehearing en banc is included in the appendix to this petition. Appendix at A51.

V.

ARGUMENT IN SUPPORT OF PETITION

1. The Sign from God Constituted an Improper Extra-Judicial Influence on the Guilt Determination Process

After the verdict was returned, defense counsel learned that a juror had prayed for a sign from God which would confirm the correctness of a guilty verdict and demonstrate that a dissenting juror would change his vote from not guilty to guilty. In addition, this juror claimed to have been informed through prayer that her request for a sign from God had been answered, and that if the dissenting juror wore his blue blazer to court on August 20, 1986, the final day of deliberations, this would demonstrate that a guilty verdict was correct and that the dissenter would change his vote.

Based upon this extra-judicial influence on the jury's deliberative process, the defense filed a motion for new trial and requested a full evidentiary hearing. This motion was supported by a declaration from a juror who learned of another juror's receipt of the sign from God.[3] The motion stressed the need for a complete

---

[3]In her declaration, juror Giles stated that on the morning of August 20, 1986, she arrived at the courthouse and took the elevator to the third floor. Several other jurors were on the same elevator. During the ride to the third floor, Giles heard juror Grantham make a statement to the effect that she hoped someone else, whom she did not name, would be wearing his blue blazer. At that time, Giles did not know what this statement meant. On the afternoon of August 20th, after the jury returned its verdict, Giles accompanied

evidentiary hearing on the jury's exposure to the sign from God.

The district court denied the motion for new trial and the request for an evidentiary hearing because the declaration did not allege that individual jurors relied on the sign from God in reaching a verdict [R.T. 3108].[4] This ruling was based upon a patently erroneous interpretation of Federal Rule of Evidence 606(b).[5]

---

several other jurors to a restaurant. At that time, juror Casillas told Giles that: (1) one of the other jurors had said a prayer to God that juror Geudtner would change his vote from not guilty to guilty; (2) this juror had asked for, and claimed to have received, a sign from God confirming that her prayer had been heard and that Geudtner would change his vote; and (3) that the sign from God was that Geudtner would be wearing his blue blazer to court on the morning of August 20th.

[4]The designation "R.T." refers to the reporter's transcript of proceedings. In denying the motion for new trial, the court stated:

> "I have, of course, reviewed the declaration of Audrey Giles, the juror from whom the declaration was obtained and submitted on behalf of the defendant on this motion, and even if the court were to accept all of the facts set forth in this declaration as true, there is no indication that any of the jurors either relied on the sign from God in arriving at a verdict or changed their position in reliance upon this sign. The court does not see any purpose in holding an evidentiary hearing under these circumstances and the court therefore denies the request for an evidentiary hearing and denies the defendant's motion for new trial."

[5]Rule 606(b) prohibits the defense from offering any evidence relating to the effect of an extra-judicial influence on the jury's thought processes. See, e.g., *United States* v. *Bagnariol*, 665 F.2d 877, 884-85 (9th Cir. 1981) Accordingly, the failure to offer such evidence cannot constitute proper grounds for denial of a motion for new trial. See, e.g., *Haley* v. *Blue Ridge Transfer, Inc.*, 802

The court of appeals found no error in the district court's denial of the motion for new trial or its refusal to hold an evidentiary hearing on the sign from God. Citing *Tanner v. United States*, 483 U.S. 107, 107 S.Ct. 2739 (1987), the court concluded that "[a]ll that has been alleged is that one of the jurors used prayer and a belief in a sign from God as part of her mental processes." Appendix at A44.[6]

Petitioner's research has failed to disclose any federal case dealing with a juror's receipt of a sign from God confirming a criminal defendant's guilt. However,

---

F.2d 1532, 1538 (4th Cir. 1986) (rejecting district court's conclusion that extraneous communication was harmless where conclusion was based in part on failure of juror's affidavit to "aver that any juror was influenced by the communication").

[6]The court of appeals further noted that "[n]othing in the [Giles] declaration indicates that any of the other jurors were told or became aware that a sign from God would be manifested in one juror's wearing a blue blazer while they were still deliberating." Appendix at A44. However, since the district court refused to conduct an evidentiary hearing, petitioner had no opportunity to establish what information about the sign from God was conveyed to other jurors during deliberations. Moreover, if a tangibly manifested sign from God constitutes an impermissible external influence on the jury, it is irrelevant whether the juror who received the sign discussed it with anyone else. As the court observed in *United States v. Hendrix*, 549 F.2d 1225, 1227 (9th Cir. 1977), "[i]f only one juror is biased or prejudiced or improperly influenced, the criminal defendant is denied his Sixth Amendment right to an impartial panel." Finally, although Giles' declaration did not specifically state that the sign from God was communicatedto other jurors during the deliberations, it raised a reasonable inference that such communication did take place. Based upon juror Grantham's comment to other jurors in the elevator prior to the final day of deliberations and juror Casillas' statements shortly after the verdict was returned demonstrating that he was aware of the sign from God, it is reasonable to infer that the significance of the blue blazer was conveyed to other jurors before the verdict was returned.

petitioner submits that the sign from God was the functional equivalent of a statement by a third party that petitioner was guilty of the crimes charged. This Court has consistently condemned this type of unauthorized communication to jurors. See, e.g., *Mattox v. United States*, 146 U.S. 140 (1892);[7] *Remmer v. United States*, 347 U.S. 227 (1954);[8] *Parker v. Gladden*, 385 U.S. 363, 365 (1966).[9]

Tanner v. United States, 483 U.S. 107, 107 S.Ct. 2739 (1987), does not support the court of appeals' conclusion that an objectively manifested sign from God constitutes an internal jury influence shielded from post-verdict scrutiny. *Tanner* involved allegations that members of the jury consumed alcohol and drugs during the trial

---

[7]In *Mattox*, the defendant in a murder case sought a new trial based in part on statements made by a bailiff to the jury implicating him in other murders. In reversing the conviction, this Court held that "[p]rivate communications, possibly prejudicial, between jurors and third persons . . . are absolutely forbidden and invalidate the verdict, at least unless their harmlessness is made to appear." *Id.* at 153.

[8]In *Remmer*, the Court refined the *Mattox* rule an held that "[i]n a criminal case, any communication, contact or tampering directly or indirectly with a juror during a trial about the matter pending before the jury is . . . presumptively prejudicial." *Remmer v. United States*, *supra*, 347 U.S. at 229. In these circumstances, the party seeking to uphold the verdict bears a "heavy burden" of rebutting the presumption of prejudice at a post-trial evidentiary hearing. *Id.*

[9]In *Parker*, the Court reversed a murder conviction where the evidence established that a bailiff stated to a juror: "Oh, that wicked fellow, he is guilty." The Court pointed out that "the official character of the bailiff as an officer of the court as well as the state beyond question carries great weight with a jury." *Id.* at 365. An expression of guilt from God would undoubtedly carry greater weight.

which impaired their ability to render a fair and impartial verdict. The Court rejected this argument based upon a line of authority treating allegations of juror physical or mental incompetence as "internal" rather than "external" matters. *Tanner v. United States, supra*, 107 S.Ct. at 2746-47. In reaching this conclusion, however, the Court reaffirmed *Mattox*, *Remmer* and *Parker* and expressly recognized that third party communications constitute improper extrinsic influence. *Id.* at 2746.

The sign from God went far beyond an individual juror's thought processes or subjective approach to evaluating the evidence. It was presented in an objective, tangible form and was in all likelihood communicated to other members of the jury before the verdict was reached. Petitioner submits that such an expression of guilt, whether it emanates from a human or divine source, must be viewed as an improper external influence on the deliberative process.[10]

The declaration submitted in support of the motion for new trial established that an improper outside influence was brought to bear on the jury. Although the exact nature and scope of the extra-judicial influence was not determined at an evidentiary hearing, it is clear that an objectively reasonable possibility of prejudice

[10]A sign from God of the kind at issue here would prompt or reinforce a decision to vote guilty in a manner inconsistent with a rational analysis of the evidence. A juror who believes that a guilty verdict has been approved by God might view the deliberative process as a moral or spiritual crusade rather than a dispassionate search for truth. Moreover, after learning of such a sign from God, it would be extremely difficult for a juror to change his vote from guilty to not guilty or to give serious consideration to the views of dissenting jurors.

existed in this case.[11] For this reason, and because of the significant passage of time, remand for an evidentiary hearing would be an idle gesture.[12] Accordingly, petitioner should be granted a new trial.

2. The District Court Erred in Failing to Instruct the Jury that it Must Unanimously Agree on the Three Acts Constituting the Continuing Series of Violations Element of the CCE Offense

The defense submitted two specific unanimity instructions relating to the CCE offense. The proffered instructions stated that the jury must unanimously agree on the three felony offenses comprising the "continuing series of violations" and the five persons allegedly supervised by Hernandez. The district court instructed the jury to agree unanimously on the five persons, but

---

[11]Ninth Circuit cases require reversal if there is a reasonable possibility that extrinsic material could have influenced the jury's verdict. See, e.g., *United States v. Vasquez*, 597 F.2d 192, 193 (9th Cir. 1979). The "reasonable possibility" test was defined in *Gibson v. Clanon*, 633 F.2d 851, 854 (9th Cir. 1980), *cert. denied*, 450 U.S. 1035 (1981), as equivalent to the harmless error rule applicable to constitutional errors under *Chapman v. California*, 386 U.S. 18, 24 (1967). *Id.* at 854. The court stated in *Gibson* that the proper standard is "whether it can be concluded beyond a reasonable doubt that extrinsic evidence did not contribute to the verdict." *Id.* at 855. The prosecution has the burden of proof on this issue. *Marino v. Vasquez*, 812 F.2d 499, 504 (9th Cir. 1987).

[12]See, e.g., *United States v. Thomas*, 463 F.2d 1061, 1065 (7th Cir. 1972) (district court's failure to conduct hearing on claim that jury had been exposed to prejudicial news article required new trial; remand for evidentiary hearing two years after the fact would be fruitless). See *United States v. Dozier*, 522 F.2d 224, 228 (2d Cir.), *cert. denied*, 423 U.S. 1021 (1975).

refused to give the instruction requiring unanimity on the three predicate felonies.

The court of appeals found it unnecessary to decide whether petitioner was entitled to this specific unanimity instruction because "the facts support the conclusion that the jury unanimously agreed on three predicate offenses." Appendix at A28. Accordingly, the court concluded that any instructional error on this point was harmless. Petitioner submits that the court's resolution of this issue is inconsistent with relevant case precedent and is based upon unsupported factual assumptions about the jury's deliberative process.

In *United States v. Gilley*, 836 F.2d 1206 (9th Cir. 1988), the defendants were charged with a violation of 18 U.S.C. § 1955, which requires proof that five or more persons were involved in an illegal gambling business for a period in excess of thirty days. The district court instructed the jury that it must unanimously agree on the identities of the five participants and their roles in the gambling business, but did not instruct the jury to agree on which thirty-day period these individuals were involved. Id. at 1212.

Although the defense did not request any specific unanimity instruction, the *Gilley* court held that failure to give such an instruction on the thirty-day element prejudiced the defendants' right to a unanimous jury verdict and constituted plain error. *Id.* at 1212-13. The court concluded that the case was not sufficiently simple and clear in its presentation that agreement on the specific thirty-day period could be assumed based upon the general unanimity instruction. *Id.* at 1212.

In *United States v. Echeverri*, 854 F.2d 638 (3d Cir. 1988), the court reversed the defendant's CCE conviction

because the trial judge refused a proffered unanimity instruction on the three felonies comprising the continuing series of violations. As in Gilley, the court concluded that "the usual rule that a general unanimity instruction is sufficient gives way when the complexity of the case, or other factors, creates the potential that the jury will be confused." Id. at 643.[13]

The complexity and potential for jury confusion which led to reversal in *Gilley* and *Echeverri* are present here: (1) the CCE offense is an inherently complex crime with many elements that can produce jury confusion; (2) the trial in this case was long and the evidence complex;[14] (3) the government presented evidence of numerous predicate offenses covering a significant time span; (4) the probative force of the evidence with respect to individual predicate offenses varied significantly;[15] (5) the evidence did not unequivocally eliminate the

---

[13]The *Echeverri* court found potential for jury confusion because: (1) there was evidence of numerous drug violations, any three of which could have been the focus of an individual juror; (2) the indictment did not specify the violations comprising the continuing series; and (3) the trial court gave a specific unanimity instruction regarding the offenses comprising the pattern of racketeering element of the RICO count, thereby increasing the risk that the jury would infer unanimity was not required on the offenses comprising the CCE continuing series. *Id.* at 643.

[14]With the concurrence of all counsel, the district court declared this case to be complex for purposes of the Speedy Trial Act. The transcript of trial and post-trial proceedings is approximately 3,200 pages.

[15]The evidence presented in support of the predicate offenses is discussed in Exhibit "C" to Appellant's Supplemental Brief filed on July 11, 1988. A copy of that exhibit is included in the appendix to this petition. Appendix at A52.

possibility of juror confusion or disagreement with respect to petitioner's involvement in specific predicate offenses; and (6) the trial judge advised the jury as to the need for unanimity on another element of the offense,

increasing the likelihood that the jury would conclude unanimity was not required with respect to the three predicate felonies.

In support of its harmless error finding, the court of appeals noted that because the jury returned guilty verdicts on two Title 21 conspiracy offenses which were included in the CCE count's list of eleven predicates, it is clear that the jury unanimously agreed on two of the required three offenses. Appendix at A28. The court further noted that the remaining predicates listed in the CCE count were substantive marijuana offenses alleged to have been committed by members of the conspiracy.[16] Although the substantive marijuana transactions were not charged as separate offenses in the indictment, the court of appeals concluded that "[i]n the context of this case, it is inconceivable that the jurors would not have found that these substantive offenses were committed." Appendix at A29.

In an effort to find unanimous agreement on a third predicate offense, the court of appeals engaged in unwarranted speculation about the jury's deliberative

[16]In fact, the "continuing series" evidence was not limited to the transactions identified in the indictment. The government called Jose Miranda to testify about petitioner's uncharged marijuana dealing in Arizona during the early to mid-1970's. In overruling defense objections to this testimony, the court ruled that the offenses described by Miranda could be considered by the jury as proof of the continuing series of violations element, even though these offenses were not included in the indictment's list of CCE predicates or otherwise charged in the indictment.

process. In essence, the court assumed the jury must have agreed that all of the eligible predicate offenses were committed. This approach, which was implicitly rejected in *Echeverri*,[17] is based upon an incorrect assessment of the government's evidence[18] and ignores the admonition in *United States v. Payseno*, 782 F.2d 825, 836 (9th Cir. 1986), that in determining the need for specific unanimity instructions, appellate courts "are not free to speculate about what jurors agreed to in their . . . hours of deliberation . . ."

Contrary to the court of appeals' conclusion, this was not an "all or nothing" case in which the defense failed to challenge the sufficiency of the evidence with respect

---

[17]In *Echeverri*, the CCE defendant was also convicted of conspiracy and a substantive narcotics violation which qualified as predicate offenses. The government's evidence, which consisted of testimony from four unindicted co-conspirators and highly incriminating ledgers, established a number of additional felony violations. The court, in rejecting an unrelated claim of error, characterized this evidence as overwhelming. *United States v. Echeverri*, *supra*, 854 F.2d at 641-43, 646. However, the court did not infer from these facts that the jury must have unanimously agreed on a third predicate offense. Compare, *United States v. Anderson*, 859 F.2d at 1171, 1176 (3d Cir. 1988) (rejecting claim of plain error based upon failure to give a specific unanimity instruction on the three CCE predicates; since the jury returned guilty verdicts on three separate counts charging eligible CCE predicates, the record clearly demonstrated unanimity on the required three offenses).

[18]The government's case was based principally upon the testimony of informants who received immunity from prosecution, money and other benefits for their testimony. The defense sharply attacked the credibility of the government's informants and presented testimony and other evidence to prove that petitioner was involved in legitimate business activities and that he received substantial money from investors in Mexico in connection with these activities.

to any particular continuing series offense. The record reflects that specific offenses were challenged through cross-examination and the presentation of contradictory evidence, and that jurors could reasonably have disagreed over whether individual continuing series offenses had occurred. Appendix at A52.

3. The Court of Appeals Erroneously Approved a Preponderance of the Evidence Standard for CCE Criminal Forfeitures

The CCE count alleged that various assets were subject to criminal forfeiture under 21 U.S.C. § 848(a)(2). Before the indictment was returned in May 1986, the forfeiture provisions of § 848 were repealed and superseded by § 853. However, all of the government's evidence related to conduct which occurred before the October 1984 statutory revision.

The district court held, over defense objection, that the criminal forfeiture provisions of § 853 were retroactively applicable to conduct occurring before their effective date [R.T. 2456-60] and that § 853 replaced the "reasonable doubt" standard of proof with a preponderance standard [R.T. 2668]. Based on this interpretation of § 853, the court instructed the jury to resolve the criminal forfeiture issues by a preponderance of the evidence [R.T. 2960-61].

The court of appeals, relying on *United States v. Sandini*, 816 F.2d 869 (3d Cir. 1987), held that § 853 criminal forfeiture is a penalty rather than an element of the CCE offense and is therefore not subject to constitutional requirements of proof beyond a reasonable doubt. In addition, the court concluded that Congress intended § 853 forfeiture to be governed by

a preponderance of the evidence standard. Appendix at A34-41.

Regardless of whether criminal forfeiture is appropriately characterized as an element of the offense or an additional punishment,[19] it is clear that cases arising under the preamendment forfeiture provisions uniformly applied the proof beyond a reasponable doubt standard. As stated in *United States v. McKeithen*, 822 F.2d 310, 312 (2d Cir. 1987):

> "Criminal forfeitures are actions *in personam* . . . Thus, forfeiture is imposed 'directly on an individual as part of a criminal prosecution rather than in a separate proceeding *in rem* against the property subject to forfeiture.' The government must allege forfeiture in the information or indictment and carries the burden of proof beyond a reasonable doubt."

See, *United States v. Cauble*, 706 F.2d 1322, 1347-48 (5th Cir. 1983) (noting that district court instructed jury

---

[19]This Court recently described criminal forfeiture under Title 21 as "a substantive charge in the indictment against a defendant." *Caplin & Drysdale Chartered v. United States*, ___ U.S. ___, 109 S.Ct. 2646, 2654 n.5 (1989). In *United States v. Garrett*, 727 F.2d 1003 (11th Cir. 1984), *aff'd*, 471 U.S. 773 (1985), the court held that the Sixth Amendment right to jury trial applied to the forfeiture stage of a prosecution under § 848. In that connection, the court rejected the argument that forfeiture is simply a matter of punishment: "We reject the government's distinction between the trial on the issue of guilt and subsequent determinations, and the government's characterization of forfeiture as 'essentially a matter of punishment' indistinguishable from ordinary sentencing." *Id.* at 1012 & n.6. Finally, the Advisory Committee Note to Rule 31(e) of the Federal Rules of Criminal Procedure states: "The assumption of the draft is that the amount of the interest or property subject to criminal forfeiture is an element of the offense to be alleged and proved." The court of appeals concluded that "the assumption of the commentary is simply incorrect." Appendix at A40-41.

that RICO allegations must be proved beyond a reasonable doubt);[20] *United States v. Spilotro*, 680 F.2d 612 (9th Cir. 1982); *United States v. Crozier*, 674 F.2d 1293 (9th Cir. 1982).[21]

---

[20]The government's brief in opposition to a petition for certiorari in *Cauble* emphasized the different burdens of proof in civil and criminal forfeiture proceedings:

> "A defendant in a criminal forfeiture case has all of the protections that apply to any other criminal case. The owner of property subject to civil *in rem* forfeiture has far fewer substantive and procedural rights. The government typically needs to show only probable cause to believe the property is subject to forfeiture. The burden then shifts to the claimant-owner to show, by a preponderance of the evidence, that the property is not forfeitable . . . By contrast, criminal forfeiture under RICO requires that a defendant be found guilty beyond a reasonable doubt of one of the most serious federal criminal offenses and that the jury further find, again beyond a reasonable doubt, that the property in question is so related to the RICO offense that it is subject to forfeiture under the statute."

Brief in Opposition to Petition for Certiorari, *Cauble v. United States*, No. 83-585 (October Term 1983), quoted in Smith, *Prosecution and Defense of Forfeiture Cases*, § 13.01 at p. 13-5 to 13-6 (1989)

[21]*Spilotro* and *Crozier* addressed this issue in the context of pretrial restraining orders under 18 U.S.C. § 1963 and 21 U.S.C. § 848:

> "Before a court can issue such a restraining order, . . . the government must demonstrate that it is likely to convince a jury, beyond a reasonable doubt, of two things: one, that the defendant is guilty of violating [the statute] and two, that the profits or properties at issue are subject to forfeiture under the provisions of [the statute]."

United States v. Spilotro, *supra*, 680 F.2d at 618. Accord, *United States v. Crozier*, *supra*, 674 F.2d at 1298.

Contrary to the conclusion reached in *United States v. Sandini*, 816 F.2d 869 (3d Cir. 1987), and by the court of appeals in this case, the language[22] and legislative history[23] of the 1984 forfeiture amendments do not reflect

---

[22]Section 853(d) establishes a rebuttable presumption that the property of any person convicted of a Title 21 felony is subject to forfeiture if the government establishes two preliminary facts by a preponderance of the evidence: (1) that the property was acquired during or within a reasonable time after the period of the felony violation; and (2) there was no likely source for the property other than the alleged violation. However, there is nothing in this clause, or any other part of § 853, which indicates that the government's ultimate burden is anything less than proof beyond a reasonable doubt. See *United States v. Pryba*, 674 F.Supp. 1518, 1520-21 (E.D. Va. 1987) (criticizing *Sandini's* reliance on § 853(d)'s rebuttable presumptin as support for the conclusion that Congress intended Title 21 criminal forfeitures to be governed by a preponderance of the evidence test). In this case, the district court did not instruct the jury on the nature and effect of this statutory presumption. Instead, the court gave a hybrid instruction, telling the jury to apply the preponderance standard to the preliminary facts and the ultimate issue of forfeitability.

[23]The author of a leading treatise on forfeiture law rejects *Sandini*'s interpretation of the burden of proof applicable to § 853 criminal forfeiture proceedings: "There is not the slightest suggestion in the legislative history that Congress thought it was radically lowering the government's overall burden of proof." Smith, *Prosecution and Defense of Forfeiture Cases*, § 14.04 at p. 14-21 (1989). In fact, the legislative history of the 1984 amendments reflects Congress' intent to distinguish the standard of proof in civil forfeiture cases from the burden of proof in criminal corfeiture litigation. The Senate Report, in discussing the differences between criminal and civil forfeiture, notes: "The 'preponderance of the evidence' standard of proof applies in civil forfeitures as in other civil actions." The next paragraph of the report omits any reference to the preponderance standard as applied to criminal forfeitures. Moreover, although the Senate Report discusses specific procedural changes introduced by the 1984 amendments to facilitate the use of criminal forfeiture, it makes no reference to any modification of the government's ultimate burden of proof. Senate Report 98-225, reprinted in 1984 *U.S. Code Congressional & Administrative News* 3142, 3374.

a clear congressional intent to replace proof beyond a reasonable doubt with the less rigorous preponderance of the evidence standard. In addition, post-amendment cases[24] and legal commentary[25] support the conclusion that criminal forfeiture is still governed by the traditional proof beyond a reasonable doubt standard. In fact, the Justice Department endorsed application of the

[24]See, *United States v. Rivera*, 884 F.2d 545, 546 (11th Cir. 1989) (noting that district court gave reasonable doubt instruction in § 853 criminal forfeiture proceeding); *United States v. Dunn*, 802 F.2d 646, 647 (2d Cir. 1986) (holding that an unsuccessful criminal forfeiture action under § 853 does not bar the government from instituting a civil forfeiture action against the same property because the two proceedings are governed by different burdens of proof); *United States v. Vogt*, 713 F.Supp. 847, 867 (M.D.N.C. 1987) (district judge, as trier of fact, applied reasonable doubt standard in RICO criminal forfeiture case); *United States v. Pryba*, 674 F.Supp. 1518, 1520 (E.D. Va. 1987) (rejecting *Sandini*'s analysis of the legislative history of the 1984 forfeiture amendments and holding that RICO forfeiture allegations must be proven beyond a reasonable doubt).

[25]See, Markus, "Procedural Implications of Forfeiture Under RICO, the CCE and the Comprehensive Forfeiture Act of 1984: Reforming the Trial Structure," 59 *Temple Law Review* 1097, 1124-25 (1986); Smith *Prosecution and Defense of Forfeiture Cases*, § 14.03 at p. 14-19 (1989) (recognizing that criminal forfeiture requires proof beyond a reasonable doubt and arguing that the presumption of § 853(d) is unconstitutional to the extent it permits forfeiture based upon a lesser showing); *Pattern Jury Instructions*, U.S. Eleventh Circuit District Judges Association, no. 51.3 at p. 185 (1985); Sand, et al., *Modern Federal Jury Instructions*, no. 52-34 (1989) (both using reasonable doubt as the appropriate standard for RICO forfeiture).

reasonable doubt standard in a manual on RICO criminal forfeiture[26] and in congressional testimony relating to the 1984 amendments.[27]

Finally, if § 853 did establish a preponderance of the evidence standard for CCE criminal forfeiture, application of this reduced burden of proof to conduct which occurred before the effective date of the 1984 amendments is barred by the ex post facto clause. The court of appeals rejected petitioner's ex post facto claim on the ground that the change effected by § 853 is procedural. Appendix at A34. However, the standard of proof by which the jury must decide criminal forfeiture claims is far more substantive than the mechanism for issuing pretrial orders involved in *United States v. Crozier*, 777 F.2d 1376, 1383 (9th Cir. 1988), the case relied upon by the court. This Court has recognized that statutes which alter the degree or lessen the amount or measure of proof necessary to sustain a conviction are subject to the ex post facto clause.[28]

---

[26]The Justice Department publication "RICO: A Manual for Federal Prosecutors" states at page 82: "The jury must be convinced beyond a reasonable doubt of the relationship of the property interest to be forfeited to the RICO violation." The courts have regarded such publications as "important evidence of the understanding of the department of government charged with the administration" of criminal statutes. *United States v. Ivic*, 700 F.2d 51, 64 (2d Cir. 1983).

[27]An earlier version of § 853 expressly modified the burden of proof for criminal forfeiture to a preponderance of the evidence. In testimony before a House subcommittee, the Justice Department took the position that this reduced burden of proof was constitutional but unnecessary. The Department proposed § 853(d) instead. Smith, *Prosecution and Defense of Forfeiture Cases*, § 14.03 at p. 14-20 n.6 (1989).

[28]See, e.g., *Hopt v. Utah*, 110 U.S. 574, 589 (1884); *Beazell v. Ohio*, 269 U.S. 167, 169-70 (1925); *Miller v. Florida*, ___ U.S. ___, 107 S.Ct. 2446, 2450 (1987). Consistent with this basic principle,

VI.
CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be granted.

Respectfully submitted,
Law Offices of Barry Tarlow

Barry Tarlow
Mark O. Heaney

Attorneys for Petitioner
DONACIANO HERNANDEZ-ESCARSEGA

---

the courts have denied retrospective application to statutes which alter the burden of proof. See, e.g., *United States v. Kowal*, 595 F.Supp. 375, 378-89 (D. Conn. 1984) (holding, *inter alia*, that retroactive application of section of Insanity Defense Reform Act of 1984 reallocating burden of proof on insanity defense violates ex post facto clause); *United States ex rel. Steigler v. Board of Parole*, 501 F.Supp. 1077 (D. Del. 1980) (retrospective application of law conditioning state parole on favorable vote of four of five board members rather than simple majority violated ex post facto clause).

APPENDIX

APPENDIX
RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Article I, section 9, clause 3 of the United States Constitution provides:

> "No Bill of Attainder or ex post facto Law shall be passed."

The Fifth Amendment to the United States Constitution provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Sixth Amendment to the United States Constitution provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to

have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Rule 606(b) of the Federal Rules of Evidence provides:

"Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes."

Title 21, United States Code, sections 853(a) and (d) provide:

"(a) Any person convicted of a violation of this subchapter or subchapter II of this chapter punishable by imprisonment for more than one year shall forfeit to the United States, irrespective of any provision of State law-

(1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation;

(2) any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation; and

(3) in the case of a person convicted of engaging in a continuing criminal enterprise in violation of section 848 of this title, the person shall forfeit, in addition to any property described in paragraph (1) or (2), any of his interest in, claims against, and property or contractual rights affording a source of control over, the continuing criminal enterprise.

The court, in imposing sentence on such person, shall order, in addition to any other sentence imposed pursuant to this subchapter or subchapter II of this chapter, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this part, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

. . .

(d) There is a rebuttable presumption at trial that any property of a person convicted of a felony under this subchapter or subchapter II of this chapter is subject to forfeiture under this section if the United States establishes by a preponderance of the evidence that-

(1) such property was acquired by such person during the period of the

violation of this subchapter or subchapter II of this chapter or within a reasonable time after such period; and

(2) there was no likely source for such property other than the violation of this subchapter or subchapter II of this chapter.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. DONACIANO HERNANDEZ-ESCARSEGA, *Defendant-Appellant.*	No. 86-5320 D.C. No. CR-85-0536-1-JLI OPINION

Appeal from the United States District Court
for the Southern District of California
J. Lawrence Irving, District Judge, Presiding

Argued and Submitted February 5, 1988
Pasadena, California
Submission Withdrawn June 17, 1988
Resubmitted September 12, 1989

Filed October 4, 1989

Before: Procter Hug, Jr., Alex Kozinski and
John T. Noonan, Jr., Circuit Judges.

Opinion by Judge Hug

SUMMARY

Search and Seizure/Criminal Procedure/Criminal Sentencing

Affirming in part and vacating in part the district court's judgment of conviction, the court held that double jeopardy is violated by cumulative punishment imposed for conspir-

acy convictions under both 21 U.S.C. § 846 and § 848 even if the sentences run concurrently.

Following an 18-day trial, a jury found appellant Donaciano Hernandez-Escarsega guilty of a series of drug-related offenses, specifically conspiracy to import marijuana in violation of 21 U.S.C. §§ 952, 960, and 963 (1982 and Supp. V 1987); conspiracy to possess marijuana with intent to distribute, in violation of 21 U.S.C §§ 841 and 846 (1982 and Supp. V 1987); conspiracy to travel in interstate and foreign commerce in aid of a racketeering enterprise, in violation of 18 U.S.C. §§ 371 and 1952(a)(3); and engaging in a continuing criminal enterprise, in violation of 21 U.S.C. § 848 (Supp. V 1987). Hernandez was sentenced to 40 years in prison and the forfeiture of various properties on the continuing criminal enterprise conviction and received concurrent sentences of 5, 15, and 5 years on the three conspiracy convictions. On appeal, Hernandez raised a battery of claims challenging his convictions, sentencing, and the order of forfeiture.

[1] Shortly after a grand jury returned an indictment charging Hernandez and 20 co-conspirators with numerous drug-related crimes, Government agents executed search warrants at two residences and one office connected to Hernandez. The warrants were based on allegations contained in a single affidavit presented to the magistrate by Agent Larry Johnson. Hernandez contended that the Johnson affidavit failed to establish probable cause to search his office and residences and that the warrants were overbroad, both facially and as executed. A finding that under the totality of the circumstances, the magistrate had a substantial basis for concluding that probable cause existed is sufficient to uphold the warrant. [2] To aid the magistrate in making such determination, Agent Johnson submitted a 52-page affidavit describing in detail his investigation of Hernandez. [3] Given the wealth of incriminating information detailed in the Johnson affidavit, the court concluded that the magistrate had a substantial basis for his probable cause finding. Numerous individuals

testified to the fact that Hernandez' involvement with drugs had been far from casual for over ten years. [4] Hernandez argued that the information contained in Johnson's affidavit was too stale to establish probable cause, but the continuous nature of the activity diminishes the significance of the time lag between the acts described in the affidavit and presentation of the affidavit to the magistrate. [5] Hernandez also contended that the affidavit failed to establish probable cause that the items to be seized could be found at the premises searched. However, the magistrate need not determine that the evidence sought is in fact on the premises to be searched. He need only conclude that it would be reasonable to seek the evidence in the place indicated in the affidavit. When the traffickers consist of a ringleader and assistants, a fair probability exists that drugs will be present at the assistants' residence as well as the ringleader's. [6] Hernandez contended that even if probable cause existed, the search warrants must be invalidated as impermissibly overbroad. [7] Hernandez' argument that the warrants, in effect, permitted seizure of virtually all of his records was unpersuasive. Agent Johnson's affidavit portrayed Hernandez as the kingpin of an extensive narcotics distribution network who used legitimate businesses as fronts for his illegal drug trafficking activities. Thus, there was probable cause to believe that all of Hernandez' personal and business activities were pervaded by his involvement with narcotics. Under such circumstances, the breadth of the seizure is justified by the breadth of the probable cause.

[8] Hernandez contended that the jury instructions were flawed in numerous ways. [9] Hernandez claimed that the district court erred in refusing an instruction that expressly admonished the jury that title 21 conspiracies cannot serve as predicate offenses under the continuing criminal enterprise statute. Hernandez' position is indefensible. [10] Overwhelming extra-circuit authority holds that reliance on title 21 conspiracies to establish a section 848 violation is proper. Title 21 conspiracies may serve as predicate offenses under the CCE statute. [11] In order to impose liability under section

848, the jury must find that defendant acted as organizer or manager of a criminal enterprise. Hernandez claimed that the district court erred in refusing to define the concepts of management and supervision for the jury. However, the words and phrases in the CCE statute are neither outside the common understanding of a juror, nor so technical or ambiguous as to require a specific definition. [12] Hernandez' final challenge to the district court's CCE instruction was that the trial court compromised his constitutional right to a unanimous verdict by failing to instruct the jury that it must unanimously agree on what three acts satisfied section 848's continuing series requirement. [13] Since Hernandez was convicted of both conspiracy to import marijuana and conspiracy to possess with intent to distribute, all of the offenses committed by his co-conspirators could be attributed to Hernandez. Thus, the jurors' unanimous agreement that Hernandez committed at least three violations of the federal narcotics law cannot seriously be questioned. [14] Finally, Hernandez contended that the CCE instruction was flawed because it informed the jury that only conspiracies should be considered when determining whether Hernandez was guilty of a continuing series of violations. [15] The language of the instruction did not actually limit the offenses to conspiracies, but stated that the offenses must be violations of the Federal narcotics laws. In the context of the whole trial, it was clear that the other offenses specified in the indictment were to be considered.

[16] Hernandez argued that section 853(a)(1) expanded the category of property subject to forfeiture. Although the specification of property subject to forfeiture in section 853(a)(1) may be more precise, it does not expand the property reachable, but merely defines it more accurately. [17] Hernandez' second argument was that section 853(c) expanded the category of forfeitable property, but his argument only pertains to the interest of a third party, and he has no standing to complain of any due process violation with regard to a third-party interest. [18] Hernandez contended that the instruction erroneously required the Government to establish the forfeiture

by a preponderance of the evidence. [19] Although it is constitutionally mandated that the elements of a crime be proved beyond a reasonable doubt, forfeiture of property is not an element of the continuing criminal enterprise offense; it is an additional penalty prescribed for that offense. Proof beyond a reasonable doubt is not constitutionally mandated.

[20] Because the court imposed concurrent sentences for the conspiracy charges and the CCE charge, Hernandez contended that the double jeopardy clause precludes the imposition of these concurrent sentences. Congress did not intend to allow cumulative punishment for violations of section 846 conspiracies and the greater offense of a section 848 CCE violation. The district court must vacate the the convictions under Counts One and Two for the violation of section 846.

COUNSEL

Barry Tarlow and Mark O. Heaney, Los Angeles, California, for the defendant-appellant.

Roger W. Haines, Jr., Assistant United States Attorney, San Diego, California, for the plaintiff-appellee.

OPINION

HUG, Circuit Judge:

On August 20, 1986, following an 18-day trial, a jury found Donaciano Hernandez-Escarsega ("Hernandez") guilty of a series of drug-related offenses. Specifically, the jury convicted Hernandez of conspiracy to import marijuana, in violation of 21 U.S.C. §§ 952, 960, and 963 (1982 & Supp. V 1987); conspiracy to possess marijuana with intent to distribute, in violation of 21 U.S.C. §§ 841 and 846 (1982 & Supp. V 1987);

conspiracy to travel in interstate and foreign commerce in aid of a racketeering enterprise, in violation of 18 U.S.C. §§ 371 and 1952(a)(3) (1982); and engaging in a continuing criminal enterprise, in violation of 21 U.S.C. § 848 (Supp. V 1987). Hernandez was sentenced to 40 years in prison and the forfeiture of various properties on the continuing criminal enterprise conviction. He received concurrent sentences of 5, 15 and 5 years on the three conspiracy convictions.

In this appeal, Hernandez raises a battery of claims challenging his convictions, sentencing, and the order of forfeiture. His myriad contentions, and the facts pertinent thereto, are addressed under separate headings. We affirm the conviction for engaging in a continuing criminal enterprise and the property forfeiture. We also affirm the conviction for conspiracy to travel in aid of a racketeering enterprise. We remand for vacation of the convictions for the conspiracy to import marijuana and the conspiracy to possess with intent to distribute as being punishment that is impermissibly cumulative, under the Double Jeopardy clause, to the sentence imposed for the continuing criminal enterprise conviction.

I.

ADEQUACY OF SEARCH WARRANTS

[1] On July 27, 1985, a grand jury returned an indictment charging Hernandez and 20 co-conspirators with numerous drug-related crimes. Shortly thereafter, on August 8, Government agents executed search warrants at two residences and one office connected to Hernandez. The warrants were based on allegations contained in a single affidavit presented to the magistrate by Agent Larry Johnson, an investigator with the San Diego Integrated Narcotic Task Force. Hernandez contends that the Johnson affidavit failed to establish probable cause to search his office and residences. He further argues that the warrants were overbroad, both facially and as executed. We review a magistrate's determination of probable

cause only for clear error. *See United States v. McQuisten*, 795 F.2d 858, 861 (9th Cir. 1986). A finding "that under the totality of the circumstances the magistrate had a substantial basis for concluding that probable cause existed" is sufficient to uphold the warrant. *Id.* (citation omitted). In contrast, this court reviews *de novo* the district court's finding that a warrant describes with sufficient particularity the items to be seized. *See United States v. Rabe*, 848 F.2d 994, 997 (9th Cir. 1988).

A. *Probable Cause*

[2] When deciding whether to issue a warrant, a magistrate must "make a practical common-sense decision whether, given all the circumstances set forth in the affidavit before him, . . . there is a fair probability that contraband or evidence of crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238-39 (1983). To aid the magistrate in making this determination in the present case, Agent Johnson submitted a 52-page affidavit describing in detail his investigation of Hernandez. The affidavit begins with a discussion of Johnson's extensive training and experience in drug trafficking matters. It notes that Hernandez and others recently were indicted on a series of drug charges stemming from the activities described in the affidavit. It then summarizes Agent Johnson's conclusions, stating that Hernandez appears to be the head of a large-scale drug smuggling organization operating in Southern California and Arizona, that this operation involves the transportation of drugs by airplane from Mexico for distribution in the United States, and that over 200 individuals purportedly work under Hernandez' control.

In support of these conclusions, the Johnson affidavit first recounts information supplied by Hernandez' former paramour, Rosemary Rosales, to the Yuma County Sheriff's Office. In her statement, given to the police in 1977, Rosales described her participation in and Hernandez' orchestration of extensive smuggling activity spanning several years. The

information is detailed and indicates that Hernandez was involved in a major drug-trafficking operation. Indeed, Rosales estimated that she handled millions of dollars for Hernandez in connection with his narcotics activities. Rosales also told the police in this interview that it was initially her idea to use the proceeds from Hernandez' drug smuggling to invest in legitimate businesses and real estate. Rosales' story was corroborated both by her arrest in 1974 for transporting approximately 400 pounds of marijuana and by the statements of a confidential informant (Confidential Source 4) attesting to the fact that Hernandez and Rosales were engaged in drug smuggling during the seventies and early eighties.[1]

The Johnson affidavit next describes the purchase of an airplane in 1983 by Francis Mulleaux and Frank Peacock, alleged associates of Hernandez. The airplane was purchased with $80,000 in cash and the seller was requested by the buyers to leave the bill of sale blank. In further discussions, the buyers indicated that the "money man" behind the purchase was a Mexican national living in Los Angeles. Two of Johnson's confidential informants reported being told by Peacock that Hernandez supplied the money for this transaction.

James Richards was arrested in December 1983. A search of his car revealed evidence linking Richards to Peacock and Mulleaux and implicating him in marijuana trafficking. In a

[1]In his brief, Hernandez contends that the Johnson affidavit is flawed because it contains material misrepresentations and does not include relevant information regarding the credibility of several information sources, including Rosales. However, when the district court specifically inquired whether Hernandez sought a hearing pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978), counsel expressly stated that the defense did not want such a hearing. *See United States v. Hernandez-Escarsega*, No. 85-536-JLI-Crim. (S.D. Cal. July 18, 1986). Nor has Hernandez contested the district court's failure to hold a *Franks* hearing on appeal. Under these circumstances, we will not consider Hernandez' allegations in ruling on the sufficiency of the affidavit. *See United States v. Spillone*, 879 F.2d 514, 523 (9th Cir. 1989).

subsequent statement to the police, Richards admitted that he participated in an air smuggling organization headed by an individual known to him as "Don." Richards had personal knowledge of the importation of four loads of marijuana. He identified the organization's main pilot as "Frank." Finally, Richards identified Frank as the pilot of a plane that crashed in October 1983. Police reports confirmed that the plane was found in the area described by Richards. There was marijuana debris in the aircraft.

Confidential Source 1 ("CS1") also related information concerning Peacock, Mulleaux, and Hernandez to Agent Johnson for inclusion in the warrant affidavit. In addition to supplying general comments about the relationship of these individuals, CS1 gave a specific description of Peacock's arrest in Mexico during 1983 and Hernandez' subsequent efforts to obtain the release of Peacock and his plane. Peacock later told CS1 that Hernandez had paid one million dollars to the Mexican police to effect his release and the release of his marijuana-stocked aircraft. Finally, CS1 provided information regarding Hernandez' reaction to Richards' arrest and Hernandez' involvement in cocaine smuggling during December 1983.

Confidential Source 2 ("CS2") corroborated much of the information provided by CS1. In addition, CS2 recounted several conversations with Peacock during which Peacock discussed the scope of Hernandez' drug-trafficking organization. For instance, Peacock told CS2 that Hernandez was the largest smuggler of marijuana in southern California, that he had hundreds of individuals working for him in his nationwide narcotic distribution organization, that he was extremely wealthy from drug trafficking, and that he had accumulated substantial real estate over the years with proceeds derived from the sale of narcotics. Finally, CS2 described in some detail two instances in late 1983 when Peacock flew loads of marijuana into the United States.

Confidential Source 3 ("CS3"), debriefed in mid-1984, indicated that he was aware that during December 1983 and January 1984, Hernandez received and distributed 20 tons of marijuana. According to CS3, Hernandez and another individual almost totally controlled the marijuana market in the Los Angeles area. CS3 was also aware that Hernandez had opened a bar in Arizona called the "Cat Palace" which was used to launder money.

Agent Johnson's affidavit also included a description of an incident that occurred on September 17, 1984, at the San Ysidro Port of Entry. On that date, Hernandez and another individual, Antonio Quintero-De Avila, entered the United States from Mexico through the San Ysidro checkpoint. The two men were asked if they had anything to declare and, based upon Hernandez' statement that he had more than $5,000, were referred to secondary inspection. Hernandez filled out a form declaring $7,800. A subsequent search of the vehicle, however, revealed additional money secreted in the rear spare tire area. After being read his *Miranda* rights, Hernandez stated that, other than admitting that the money belonged to him, he did not wish to talk. The currency seized by customs agents during this incident was later subjected to a canine sniff. The dog's alert indicated that the money had been in proximity to narcotics.[2]

[2]Hernandez argues that the currency seizure and subsequent dog alert should not be factored into the probable cause calculus because they constitute fruits of statements made by Hernandez during the course of an illegal interrogation by customs agents. The district court concluded that Hernandez' statements, the seized money, and the canine alert were all properly considered by the magistrate. We agree. The initial stop and questioning of Hernandez, which led to the money seizure and canine sniff, was justified by his presence at the border. *See United States v. Alfonso*, 759 F.2d 728, 733 (9th Cir. 1985) ("mere entry into the United States from a foreign country provides sufficient justification for a border search"). When unreported currency was discovered in his vehicle, Hernandez was read his *Miranda* rights. Even if Hernandez is correct in his assertion that his *Miranda* rights were somehow violated during this interchange with

Agent Johnson's affidavit concludes with a description of Hernandez' relationship to the three locations to be searched. Based upon this information, the magistrate determined that probable cause existed sufficient to justify the issuance of the warrants sought by the authorities. The district court concurred in this conclusion.

[3] Given the wealth of incriminating information detailed in the Johnson affidavit, we have little difficulty concluding that the magistrate had a "substantial basis" for his probable cause finding. Numerous individuals testified to the fact that Hernandez' involvement with drugs had been far from casual for over ten years. Although the reliability of several of Johnson's confidential sources was not clearly established, the detailed nature of many of their statements and the interlocking nature of their stories enhanced their credibility. *United States v. Landis*, 726 F.2d 540, 543 (9th Cir. 1984) ("interlocking tips from different confidential informants enhance the credibility of each" (citations omitted)), *cert. denied*, 467 U.S. 1230 (1984); *see also Gates*, 412 U.S. at 234 ("explicit and detailed description of wrongdoing" entitles tip to "greater weight"). Moreover, included in Agent Johnson's

---

customs, his statements, which he does not argue were involuntary, were still properly included in the warrant affidavit and relied upon to establish probable cause. *See United States v. Patterson*, 812 F.2d 1188, 1193 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 1093 (1988). Any fruits of those statements were also properly considered. *See id.*

In reviewing the magistrate's probable cause finding, however, the district judge refused to consider other evidence derived from the San Ysidro border incident because he believed it was illegally obtained. Evidence gleaned from a 1983 vehicle stop and arrest of Hernandez was also disregarded by the district court for similar reasons. We do not here review the propriety of the district court's rulings on these matters because we conclude that the Johnson affidavit is legally sufficient even without this evidence. *See United States v. Alexander*, 761 F.2d 1294, 1300 (9th Cir. 1985) (search warrant is valid if combination of all untainted information in supporting affidavit establishes probable cause).

affidavit was the fact that, on July 27, 1985, less than ten days earlier, Hernandez and 20 others were indicted for drug-related crimes. Although the fact that the grand jury found probable cause to believe that Hernandez was involved in the importation of narcotics is not determinative, *see United States v. Ellsworth*, 647 F.2d 957, 964 (9th Cir. 1981), *cert. denied*, 456 U.S. 944 (1982), it could certainly be considered by the magistrate, *see United States v. Rubio*, 727 F.2d 786, 794-95 (9th Cir. 1983). Thus, the magistrate's probable cause determination seems unassailable.

[4] Hernandez, however, argues that the information contained in the Johnson affidavit was too stale to establish probable cause in August 1985, the month when the search warrants were executed. He claims that the most recent reliable information described in the affidavit related to events occurring in December 1983, over 20 months before the warrants issued. Hernandez' argument ignores the statements made by CS3 in mid-1984 regarding Hernandez' stature in the Los Angeles drug community. It similarly disregards the incriminating evidence obtained in the September 1984 border stop. Finally, Hernandez fails to consider the fact that the Johnson affidavit detailed numerous instances of his involvement with drugs throughout the prior decade. The affidavit thus tended to establish the existence of a widespread, firmly entrenched, and ongoing narcotics operation in which Hernandez played a pivotal role. In such circumstances, staleness arguments lose much of their force. *See United States v. Dozier*, 844 F.2d 701, 707 (9th Cir.) ("mere lapse of substantial amounts of time is not controlling" where "the ongoing nature of a crime . . . might lead to the maintenance of tools of the trade"), *cert. denied*, 109 S. Ct. 312 (1988); *Landis*, 726 F.2d at 542 ("[t]he continuous nature of the activity diminishes the significance of the time lag between the acts described in the affidavit and presentation of the affidavit to the magistrate").

The affidavit in this case contained Agent Johnson's expert opinion that individuals who traffic in large quantities of

illicit drugs generally keep records, proceeds from drug transactions, and other evidence in their homes, offices, and stash houses. *See United States v. Seybold*, 726 F.2d 502, 504 (9th Cir. 1984) ("[w]e have repeatedly found the opinions of experienced law enforcement agents highly important in making probable cause determinations" (citations omitted)). Further, the records and other documentary evidence that were sought when the warrants were executed "are the type of records typically found to be maintained over large periods of time." *Dozier*, 844 F.2d at 707 (citing *Andresen v. Maryland*, 427 U.S. 463, 478 n.9 (1976)) (other citation omitted). The information relied upon by the magistrate in issuing the warrants was thus not so stale that probable cause was lacking.

[5] Nor do we believe, as Hernandez contends, that the magistrate erred in issuing the warrants because the Johnson affidavit failed to establish probable cause that the items to be seized actually existed and could be found at the premises searched. The affidavit suggested that Hernandez used legitimate businesses to launder his drug-trafficking proceeds, that he used those proceeds to purchase real estate, that he purchased airplanes and other materials to advance the ends of his extensive smuggling and distribution operation, and that he had been engaging in these activities for over ten years. In such circumstances, it was highly likely organizational records existed. Moreover, the affidavit contains Agent Johnson's expert opinion that "individuals who traffic large quantities of illicit drugs will customarily maintain books, records, receipts, notes, ledgers, airline tickets, money orders, and other papers relating to the transportation, ordering, sale and distribution of controlled substances." Finally, given these facts, the magistrate had a substantial basis for crediting Johnson's conclusion that these records were likely to be kept at his residence, the home of his wife and daughter that he had recently been observed visiting, and the Magnolia Street office. *See United States v. Fannin*, 817 F.2d 1379, 1382 (9th Cir. 1987) ("The magistrate 'need not determine that the evidence sought is *in fact* on the premises to be searched . . . or

that the evidence is more likely than not to be found where the search takes place. . . . The magistrate need only conclude that it would be reasonable to seek the evidence in the place indicated in the affidavit.'" (citation omitted)); *see also United States v. Angulo-Lopez*, 791 F.2d 1394, 1399 (9th Cir. 1986) ("In the case of drug dealers, evidence is likely to be found where the dealers live. When the traffickers consist of a ringleader and assistants, a fair probability exists that drugs will be present at the assistants' residence as well as the ringleader's." (citations omitted)).

B. *Overbreadth*

[6] Hernandez next argues that, even if probable cause existed to justify their issuance, the search warrants in this case must be invalidated as impermissibly overbroad. Specifically, Hernandez objects to the language in the warrants authorizing the seizure of the following:

> Records, including, but not limited to, notes, records and ledgers showing drug transactions, records and drug customer lists, bank records, financial records, currency, bills, log books, photographs, and any other records or documents reflecting the possession and/or distribution of controlled substances; . . . records reflecting the acquisition of property obtained with proceeds derived from narcotics trafficking; [and] records reflecting interstate and foreign travel in connection with narcotics trafficking.

According to Hernandez, these descriptions were too vague to supply any meaningful guidance to the agents who executed the warrants as to which individual documents were rightfully subject to seizure.

Under the Fourth Amendment, a search warrant must "particularly describ[e] the place to be searched, and the per-

son or things to be seized." U.S. Const. amend. IV. The Constitution thus "prohibits the issuance of general warrants that would lead to 'exploratory rummaging in a person's belongings.' " *Rabe*, 848 F.2d 994 at 997 (citations omitted). However, "[a] warrant need only be reasonably specific in its description of the objects of the search and need not be elaborately detailed." *United States v. Hayes*, 794 F.2d 1348, 1354 (9th Cir. 1986) (citation omitted), *cert. denied*, 479 U.S. 1086 (1987). In the final analysis, "[t]he specificity required in a warrant varies depending on the circumstances of the case and the type of items involved." *Center Art Galleries-Hawaii, Inc. v. United States*, 875 F.2d 747, 749 (9th Cir. 1989) (quoting *United States v. Spilotro*, 800 F.2d 959, 963 (9th Cir. 1986)) (other citation omitted). We conclude that, given the particular circumstances of this case, the warrants are sufficiently descriptive to survive constitutional attack.

In *United States v. Fannin*, 817 F.2d 1379 (9th Cir. 1987), we upheld similar language despite an overbreadth challenge. In that case, the warrant at issue authorized seizure of a series of items "including correspondence, bank records, photographs, telephone answering devices, currency, ledgers, and other items providing evidence of illegal trafficking in controlled substances." *Id.* at 1381. We concluded that the warrant was not constitutionally infirm because it limited the scope of the search to items related to the particular criminal activity described in the warrant and attached affidavit. *Id.* at 1383. It therefore effectively told the executing officers "to seize only those items related to illegal drug trafficking." *Id.*; *see also United States v. Washington*, 797 F.2d 1461, 1472 (9th Cir. 1986) (warrant authorizing seizure of "records, notes, [and] documents indicating [the defendant's] involvement and control of prostitution activity including *but not limited to*, photographs, handwritten notes, ledger books, transportation vouchers and tickets, hotel registration, receipts, bank documents as deposit slips, checks and records," etc., held not overly broad because it "effectively tells the officers to seize only items indicating prostitution

activity" (emphasis in original)); *Hayes*, 794 F.2d at 1355-56 (warrant permitting seizure of "all records which document the purchasing, dispensing and prescribing of controlled substances, including, but not limited to, records contained in patient charts . . . patient logs, appointment books and other records and ledgers reflecting distribution of controlled substances," etc. not invalid because officers limited to seizing items related to controlled substances). The warrants in this case similarly limited the discretion of the executing agents by condoning seizure only of those records reflecting possession or distribution of controlled substances, acquisition of property with drug proceeds, and interstate travel in connection with drug trafficking.

[7] Hernandez' argument that the warrants, in effect, permitted seizure of virtually all of his records does not change our analysis. Agent Johnson's affidavit portrayed Hernandez as the kingpin of an extensive narcotics distribution network who used legitimate businesses as fronts for his illegal drug trafficking activities. Thus, there was probable cause to believe that all of Hernandez' personal and business activities were pervaded by his involvement with narcotics. In such situations, the breadth of the seizure is justified by the breadth of the probable cause. *See United States v. Offices Known as 50 State Distrib. Co.*, 708 F.2d 1371, 1374 (9th Cir. 1983), *cert. denied*, 465 U.S. 1021 (1984); *see also United States v. McClintock*, 748 F.2d 1278, 1282-83 (9th Cir. 1984), *cert. denied*, 474 U.S. 822 (1985). In *50 State*, for instance, the affidavit supporting the warrant evidenced a pervasively fraudulent operation that encompassed the entire business located at the premises searched. *Id.* We upheld the warrant, which effectively authorized seizure of all business records, stating:

> While the seizure was extraordinarily broad, and in that sense "general", under the particular facts of this case the scope of the warrant was justified. It was not possible through more particular description to segregate those business records that would be evi-

> dence of fraud from those that would not, for the reason that there was probable cause to believe that fraud permeated the entire business operation of 50 State.

Id. The situation in Hernandez' case is similar and justifies the breadth of the warrants issued.[3]

The search warrants in the present case were adequately supported by probable cause and were not overbroad. Hernandez' suppression motion was thus properly denied.

II.

MOTION TO DEPOSE FOREIGN WITNESS

Before trial, Hernandez moved the district court pursuant to Fed. R. Crim. P. 15(a) for permission to take the deposition of Fernando Corona Romo, a Mexican citizen residing in Guadalajara. Hernandez claimed that Romo's testimony was material to his defense and could not otherwise be obtained because Romo, fearing arrest on an outstanding federal indictment, refused to come to the United States to testify.

[3]Relying on *United States v. Tamura*, 694 F.2d 591 (9th Cir. 1982), Hernandez claims that, regardless of the validity of the warrants, the executing agents' wholesale seizure of his business records amounted to an impermissible general search. Given our endorsement of the broad language contained in the warrants in this case, it is likely that the majority of the seized documents fell within the scope of the warrants' authorization. Further, even if some documents not covered by the warrants were improperly seized, this fact does not invalidate the entire search unless there was a flagrant disregard for the terms of the warrant. *See United States v. Crozier*, 777 F.2d 1376, 1381 (9th Cir. 1985). We see no flagrant disregard here. That being the case, "[o]nly those items which fall outside the scope of the warrant need be suppressed." *Id.* (citation omitted); *see also Andresen*, 427 U.S. at 482 n.11 (normal remedy for improper seizure is suppression and return). Hernandez does not claim that any improperly seized evidence was introduced against him at trial. Thus, his allegation that some records were improperly seized does not affect this appeal.

After hearing argument on the motion, the district judge refused to authorize the taking of Romo's deposition. Subsequent attempts by the defense to renew the motion during trial met with similar defeat. Hernandez contends on appeal that the district court's disallowance of the foreign deposition was error. We review the denial of a motion to depose a witness under Rule 15(a) for abuse of discretion. *See Territory of Guam v. Ngirangas*, 806 F.2d 895, 896 (9th Cir. 1986); *United States v. Richardson*, 588 F.2d 1235, 1241 (9th Cir. 1978), *cert. denied*, 440 U.S. 947 (1979).

Rule 15(a) provides in relevant part:

> Whenever due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved for use at trial, the court may upon motion of such party and notice to the parties order that testimony of such witness be taken by deposition . . . .

Several of our cases have suggested that "the interest of justice" is not served by using Rule 15(a) to authorize the taking of a fugitive's deposition. *See United States v. Murray*, 492 F.2d 178, 195 (9th Cir. 1973), *cert. denied*, 419 U.S. 954 (1974) ("to allow the testimony of fugitives to be taken by deposition would amount to an injustice" (citations omitted)); *see also Richardson*, 588 F.2d at 1241. More recently, however, we made clear that a potential deponent's fugitive status does not act as a complete bar to Rule 15(a) relief. *See Ngirangas*, 806 F.2d at 897. In *Ngirangas*, a case decided after Hernandez was convicted, we interpreted our earlier case as holding that fugitive status is a relevant but not dispositive factor in the Rule 15(a) calculus. *Id.* While we recognized that it is, in a sense, " 'unjust' to allow a fugitive, who flouts the legal system, to participate in that system with special dispensation, i.e., without the check of perjury sanctions," we concluded that it is at times "more unjust to deprive a defendant of what may be crucial exculpatory

testimony." *Id.* Thus, the facts of each case must be separately considered to determine whether the exceptional circumstances contemplated by Rule 15(a) exist, justifying the deposition of even those individuals who consciously hold themselves beyond the reach of the law.

Hernandez argues that the district court erred in the instant case because, contrary to our holding in *Ngirangas*, it relied *solely* on Romo's fugitive status to support its denial of his Rule 15(a) motion. Hernandez' contention, however, is not borne out by the record. It is true that the district judge was obviously disturbed by Romo's fugitive status. In denying Hernandez' motion, the judge on several occasions focused on Romo's unwillingness to testify for fear of personal prosecution. But the trial court also concluded that Hernandez had made an insufficient showing of need to justify the procedure. After reviewing the offer of proof submitted by the defense, which detailed Romo's expected testimony, the court found that the evidence was in some respects irrelevant and in others cumulative and possibly inadmissible as hearsay. Thus, it is clear that the district court considered more than Romo's fugitive state when ruling that the taking of his deposition was unwarranted.

When Rule 15(a) was adopted, "[i]t was contemplated that in criminal cases depositions would be used only in exceptional situations." Fed. R. Crim. P. 15 note. Applying the appropriate legal standard, the district court determined that exceptional circumstances were not present in this case. We have reviewed the record and cannot conclude this decision constitutes an abuse of discretion.

III.

JURY INSTRUCTION CHALLENGES

[8] Hernandez contends that the district court's instructions to the jury were flawed in numerous ways. We consider

jury instructions as a whole to determine if they are misleading or inadequate. *United States v. Beltran-Rios*, 878 F.2d 1208, 1214 (9th Cir. 1989). Whether a jury instruction misstates the applicable law is a legal question we review *de novo*. *See Collins v. City of San Diego*, 841 F.2d 337, 340 (9th Cir. 1988); *Poling v. Morgan*, 829 F.2d 882, 885 (9th Cir. 1987) (whether instructions "set out the law incorrectly" reviewed *de novo*). Similarly, a district court's failure to instruct on a defendant's theory of the case is subject to *de novo* review. *United States v. Doubleday*, 804 F.2d 1091, 1093 (9th Cir. 1986) (citation omitted), *cert. denied*, 481 U.S. 1005 (1987). It is not error, however, to reject a theory-of-the-case instruction if the other instructions in their entirety cover the defense theory. *United States v. Kenny*, 645 F.2d 1323, 1337 (9th Cir.), *cert. denied*, 452 U.S. 920 (1981). Indeed, "[s]o long as the instructions fairly and adequately cover the issues presented, the judge's formulation of those instructions or choice of language is a matter of discretion." *United States v. Echeverry*, 759 F.2d 1451, 1455 (9th Cir. 1985) (citing *United States v. Abushi*, 682 F.2d 1289, 1299 (9th Cir. 1982)).

We address each of Hernandez' instructional claims in turn.

A. *The CCE Instruction*

In order to prove that a defendant is guilty of engaging in a continuing criminal enterprise in violation of 21 U.S.C. § 848, the government must establish (1) that the defendant's conduct constituted a felony violation of federal narcotics law; (2) that the described conduct occurred as part of a continuing series of violations of federal narcotics law; (3) that the defendant undertook the activity in concert with five or more persons; (4) that the defendant acted as the organizer, supervisor, or manager of the criminal enterprise; and (5) that the defendant obtained substantial income or resources from the purported enterprise. *See United States v. Sterling*, 742 F.2d 521, 525 (9th Cir. 1984), *cert. denied*, 471 U.S. 1099

(1985).[4] For purposes of the second element, "continuing series" has been interpreted by the courts as consisting of three or more federal narcotics violations. *See id.* at 526 (citing *United States v. Valenzuela*, 596 F.2d 1361, 1367 (9th Cir.), *cert. denied*, 444 U.S. 865 (1979)); *see also United States v. Young*, 745 F.2d 733, 747 (2d Cir. 1984) (collecting cases), *cert. denied*, 470 U.S. 1084 (1985).

[9] Hernandez first argues that the government should not be able to rely on conspiracies charged in violation of 21 U.S.C. §§ 846 and 963 when attempting to establish a "continuing series" of narcotics violations for purposes of section 848 liability. He claims that the district court erred in refusing an instruction that expressly admonished the jury that title 21 conspiracies cannot serve as predicate offenses under the CCE statute. We find Hernandez' position indefensible.

[10] As the Third Circuit has recognized, the CCE statute "provides, in clear language that *any* felony violation of Subchapters I and II of Chapter 13 of Title 21 is an eligible predicate. There is no exclusionary or delimiting language as to § 846, § 963, or . . . any other felony." *United States v. Fernandez*, 822 F.2d 382, 384 (3d Cir.), *cert. denied*, 108 S. Ct. 450

---

[4]Specifically, section 848 provides in pertinent part:

> [a] person is engaged in a continuing criminal enterprise if—
>
> (1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and
>
> (2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter—
>
> (A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and
>
> (B) from which such person obtains substantial income or resources.

(1987); *see also Young*, 745 F.2d at 750; *cf. United States v. Zavala*, 839 F.2d 523, 527 (9th Cir. 1988) (noting that the CCE statute "unambiguously provides that felony violations of the relevant subchapters will suffice" when finding illegal use of a communication facility in violation of 21 U.S.C. § 843(b) a proper predicate offense), *cert. denied*, 109 S. Ct. 86 (1988). Moreover, although this circuit has not resolved the issue, overwhelming extra-circuit authority holds that reliance on title 21 conspiracies to establish a section 848 violation is proper. *See, e.g., United States v. Hall*, 843 F.2d 408, 410-11 (10th Cir. 1988); *Fernandez*, 822 F.2d at 383-85; *United States v. Ricks*, 802 F.2d 731, 737 (4th Cir.) (en banc), *cert. denied*, 479 U.S. 1009 (1986); *United States v. Rosenthal*, 793 F.2d 1214, 1227 (11th Cir.), *modified on other grounds*, 801 F.2d 378 (1986), *cert. denied*, 480 U.S. 919 (1987); *United States v. Schuster*, 769 F.2d 337, 345 (6th Cir. 1985), *cert. denied*, 475 U.S. 1021 (1986); *Young*, 745 F.2d at 748-52; *United States v. Middleton*, 673 F.2d 31, 33 (1st Cir. 1982) (dictum); *cf. United States v. Chiattello*, 804 F.2d 415, 420 (7th Cir. 1986) (noting that the question is an open one in the Seventh Circuit). We join our sister circuits and conclude that title 21 conspiracies may serve as predicate offenses under the CCE statute. The district judge's refusal to instruct the jury to the contrary therefore cannot be deemed error.

[11] We may dispatch Hernandez' second challenge to the district court's CCE instruction with similar speed. In order to impose liability under section 848, the jury must find that the defendant acted as the "organizer," "supervisor," or "manager" of a criminal enterprise. *See* 21 U.S.C. § 848(d)(1)(A); *Sterling*, 742 F.2d at 525. Hernandez claims that the district court erred by refusing to define the concepts of management and supervision for the jury. In *United States v. Johnson*, 575 F.2d 1347 (5th Cir. 1978), *cert. denied*, 440 U.S. 907 (1979), however, the Fifth Circuit expressly rejected this argument, holding that "[t]he words and phrases in the [CCE] statute are neither outside the common understanding of a

juror, nor so technical or ambiguous as to require a specific definition, *id.* at 1357-58 (citations omitted). Other case law supports the position taken by the *Johnson* court. *See Valenzuela*, 596 F.2d at 1367 (rejecting vagueness challenge to CCE statute and holding that its words "enjoy a wide currency in the business community and are commonly understood by members of the general public); *see also United States v. Anderson*, 859 F.2d 1171, 1175 (3d Cir. 1988) (quoting *Johnson*); *United States v. Marino*, 639 F.2d 882, 888 (2d Cir.), *cert. denied*, 454 U.S. 825 (1981) (term "manager" is within the common understanding of the jury and therefore needs no special definition). Although special circumstances may exist in which more specific instructions are required, *see Johnson*, 575 F.2d at 1358, we see no reason to depart from the general rule in this case.[5] The district court did not err by refusing Hernandez' definitional instructions.

[12] Hernandez' final challenge to the district court's CCE instruction is that the trial court compromised his constitutional right to a unanimous verdict by failing to instruct the jury that it must unanimously agree on what three acts satisfied section 848's continuing series requirement. Although a general unanimity instruction was given by the district court, Hernandez claims that a specific instruction focusing on the predicate acts was necessary to protect his unanimity rights. To support this assertion, Hernandez relies on a recent Third Circuit case, *United States v. Echeverri*, 854 F.2d 638 (3d Cir. 1988), which held that a specific unanimity instruction was required on somewhat similar facts.

This circuit has repeatedly held that, in the ordinary case, a general instruction on jury unanimity is sufficient to protect a defendant's constitutional rights. *See, e.g., United States v.*

[5]We note in this regard that the jury *was* instructed that "an individual who purchases substantial quantities of marijuana from a group of conspirators or invests in the group's marijuana activities is not by these facts alone guilty of the continuing criminal enterprise offense."

Anguiano, 873 F.2d 1314, 1319 (9th Cir. 1989); *United States v. Gilley*, 836 F.2d 1206, 1211 (9th Cir. 1988); *United States v. Ferris*, 719 F.2d 1405, 1407 (9th Cir. 1983). Unanimity, however, "means more than a conclusory agreement that the defendant has violated the statute in question; there is a requirement of substantial agreement as to the [principal] factual elements underlying a specified offense." *Ferris*, 719 F.2d at 1407 (citing *United States v. Gipson*, 553 F.2d 453, 457-58 (5th Cir. 1977)). Thus, "[w]hen it appears . . . that there is a genuine possibility of jury confusion or that a conviction may occur as the result of different jurors concluding that the defendant committed different acts, the general unanimity instruction does not suffice." *United States v. Echeverry*, 719 F.2d 974, 975 (9th Cir.), *modifying* 698 F.2d 375 (1983); *see also Anguiano*, 873 F.2d at 1319-21. In such situations, the trial court must augment its general instruction to ensure that the jury understands its duty unanimously to agree to a particular set of facts. *Echeverry*, 719 F.2d at 975. We need not decide in the instant case, however, whether such augmentation was necessary to safeguard Hernandez' rights, because we find that the facts support the conclusion that the jury unanimously agreed on three predicate offenses. Thus, any instructional error was harmless.

[13] In this case, the CCE charge in the indictment, which was read to the jury and taken by the jury to the jury room, listed eleven violations constituting the required series. Two of the violations were the conspiracy for importation of marijuana and conspiracy to possess with intent to distribute marijuana. Hernandez was convicted on both of these charges and thus there is no question of juror unanimity on these two listed violations. We are therefore only concerned with whether the jury unanimously agreed on at least a third violation. The remaining listed violations were substantive offenses of importation and possession with intent to distribute marijuana alleged to have been committed by members of the two conspiracies. They involved four separate missions of planes flying from Mexico and unloading shipments of mari-

juana in the United States, and a fifth occasion when marijuana was alleged to have been flown from within the United States and received by co-conspirators. In the context of this case, it is inconceivable that the jurors would not have found that these substantive offenses were committed. The co-conspirators involved testified in detail as to these events and the evidence was overwhelming. The whole thrust of the defense by Hernandez was that he was not connected with the conspiracies. In reviewing the evidence and the final arguments of the attorneys, it is apparent that the concern was not with whether the flights with large amounts of marijuana had been made or the marijuana possessed for distribution; the arguments essentially concerned Hernandez' connection to this activity. With Hernandez' conviction of the two conspiracies, all of the substantive offenses committed by his co-conspirators could be attributed to Hernandez. Under these circumstances, the jurors' unanimous agreement that Hernandez committed at least three violations of the federal narcotics law cannot seriously be questioned. Although it would have been the better practice to give a specific unanimity instruction, any error in this case was harmless.

[14] Hernandez finally contends that the CCE instruction was flawed because it informed the jury that *only* conspiracies should be considered when determining whether Hernandez was guilty of a continuing series of violations. Because the defense did not object to the instruction on this ground in the trial court as required by Fed. R. Crim. P. 30,[6] our review is only for plain error. *See Anguiano*, 873 F.2d at 1319. Plain error will be found only if an error was highly prejudicial and

[6]Rule 30 provides in relevant part:

> No party may assign as error any portion of the charge or omission therefrom unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which that party objects and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury.

there was a high probability that the alleged error materially affected the verdict; it is an exceptional remedy which we invoke only when it appears necessary to prevent a miscarriage of justice or to preserve the integrity and reputation of the judicial process. *Id.* Only rarely will an improper jury instruction justify a finding of plain error. *Id.*

[15] The trial court instructed the jury that in order to convict Hernandez under section 848 it must find beyond a reasonable doubt "that these [narcotics] offenses were part of three or more offenses committed by the Defendant over a definite period of time in violation of the Federal narcotics laws which make it a crime to conspire to import and distribute marijuana." The language of the instruction does not actually limit the offenses constituting the series to conspiracies. It states that the offenses must be violations of the Federal narcotics laws. The only incompleteness is the statement that Federal narcotics laws make it a crime to conspire to import and distribute marijuana and not going on to say they also make it a crime to import and distribute marijuana. It is difficult to believe that after three weeks of trial, the jury was not fully aware that the Federal narcotics laws also prohibit importation and distribution as well as conspiracy. In the context of the whole trial, it was clear that the other offenses specified in the indictment were to be considered. The indictment, which went to the jury room, specified those offenses. The Government counsel in his closing argument directed the jury's attention to the indictment, with reference to the series of offenses, stating:

> The Court will explain in detail exactly what that means, but a number of those alleged in the Indictment include the importation, the various loads, the flight in interstate or foreign commerce, going down to Mexico to pick up the loads is a substantive offense which may be included as part of that series.
>
> So once you have found the conspiracy you may legally attribute to the Defendant the acts of all the

> co-conspirators. In fact, the law requires that type of attribution.

The defense expressed no disagreement with this identification of the specified series of offenses at this stage, or at any other time during the trial.

We conclude that it was not highly probable that the jury was misled into believing that the Federal narcotics laws prohibited only conspiracies. We find no plain error.

B. *The Credibility Instructions*

During trial, several government witnesses related statements made by non-testifying co-conspirators Frank Peacock and James Gahan. These statements, which implicated Hernandez in large-scale drug trafficking, were admitted pursuant to Fed. R. Evid. 801(d)(2)(E) and impeached by the defense as permitted by Fed. R. Evid. 806.[7] To aid the jury in the consideration of this evidence, the defense offered the following proposed jury instruction:

> Testimony has been offered in this case referring to out of court statements allegedly made by individuals whom the prosecution alleges were co-conspirators. You must first evaluate the credibility or believability of the witness who is relating the statement. You must also evaluate the credibility of the person who allegedly made the statement and

[7]Rule 801(d)(2)(E) provides that "[a] statement is not hearsay if . . . [t]he statement is offered against a party and is . . . a statement by a coconspirator of a party during the course and in furtherance of the conspiracy." *See generally Bourjaily v. United States*, 483 U.S. 171 (1987).

Under Rule 806, when such a statement "has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness."

> who is not present in court. For example, in considering any statements by Mr. Peacock, you should evaluate his credibility in the same manner as if he were personally testifying in court. In addition to other factors, you should consider: (1) his character and/or reputation for truthfulness; (2) any dishonest act or conduct he may have committed; (3) any felony convictions; (4) his use of drugs; (5) whether his statements are supported or contradicted by other evidence; and (6) any other evidence bearing on credibility.

The district court, however, rejected the proposed instruction, stating that other instructions adequately covered the credibility issue. Hernandez contends that a major defense at trial was that the government's witnesses, including the hearsay declarants, were not credible. He thus argues that the district court's rejection of this instruction amounted to a refusal to instruct on the defendant's theory of the case.

Even if Hernandez' theory-of-the-case characterization is accepted, however, there is no error where, as here, the other instructions in their entirety covered the defense theory. *See Kenny*, 645 F.2d at 1337. In the present case, the district court judge gave a number of instructions dealing specifically with credibility. He began these instructions by noting that credibility issues had been extensively discussed by the parties. He then listed a number of factors the jury could consider in determining the credibility of witnesses, such as whether the witness was contradicted by other evidence. In addition, the district court gave special instructions to aid the jury in assessing the credibility of informants, accomplices, and immunized witnesses. Finally, the judge instructed the jury that a witness' testimony may be discredited or impeached by prior inconsistent statements, felony convictions, and reputation evidence tending to show that that witness' veracity was questionable. As the Government notes, "[u]nder these circumstances, it cannot reasonably be argued

that the jury was misled by the trial court's failure to instruct them that the same credibility factors applied to Peacock and Gahan as to the witnesses who testified directly." This is especially true because defense counsel argued extensively in closing that Peacock and Gahan's credibility was suspect and should be evaluated by the standards delineated by the district court. We conclude that the jury was sufficiently informed on these matters and that the district court therefore did not commit error by refusing Hernandez' proffered instruction.[8]

Hernandez' second attack on the court's credibility instructions must also fail. He claims that the instructions were flawed because, although they informed the jury that the testimony of accomplices, informers, and immunized witnesses that was harmful to the defendant must be viewed with caution, they failed to indicate that the testimony of these individuals that was *favorable* to the defense need not be similarly scrutinized. Once again, we conclude that the instructions given by the district court were adequate. With regard to informers, the court instructed:

> "The testimony of an informer who provides evidence *against a Defendant* for pay or for immunity from punishment or for personal advantage or vindication must be examined and weighed by the jury with greater care than the testimony of an ordinary witness. The jury must determine whether the informer's testimony has been affected *by interest or by prejudice against the Defendant*" (emphasis added).

[8]We note that, even if it would have been advisable to give *an* instruction on the credibility of hearsay declarants, the instruction advanced by Hernandez was argumentative and singled out Frank Peacock in a way that could have led the jury to believe that the district court found Peacock's statements especially questionable. This was another reason for rejecting the instruction.

Similarly the jury was told to consider, in the case of testimony from an immunized witness, "[W]hether the testimony may be colored in such a way as to further the witness' own interest, for a witness who realizes he or she may procure his or her own freedom *by incriminating another* has a motive to falsify" (emphasis added). Finally, although not as explicit, the accomplice instruction told the jury that it should give accomplice testimony "such weight as [it] feels it should have." Thus, two of the three instructions expressly limited the cautionary language to testimony adverse to Hernandez. The absence of similar language in the third instruction could not seriously have misled or confused the jury, especially since the defense argued the point in closing. We conclude that the credibility instructions were adequate.

C. *The Forfeiture Instruction*

Hernandez makes three arguments with regard to the forfeiture instruction. The first argument is that the court's instruction permitted an improperly expanded category of properties that could be subject to forfeiture. The second is that the forfeiture instruction indicated that the Government was required to prove its case by preponderance of the evidence instead of beyond a reasonable doubt. The third argument is that the instructions conflict with Fed. R. Crim. P. 31(e).

Count 8 of the indictments under which Hernandez was prosecuted alleges that various assets were subject to criminal forfeiture under 21 U.S.C. § 848(a)(2). Before trial, section 848(a) was amended, eliminating subsection (2) and instead referring to a new section 853, prescribing the basis for forfeiture. The forfeiture instruction given was based on section 853. We have previously held that the retroactive application of section 853, which was a part of the Comprehensive Crime Control Act of 1984, did not violate the Constitution's proscription against *ex post facto* laws. *United States v. Crozier*, 777 F.2d 1376, 1383 (9th Cir. 1985).

1. *Category of Property Subject to Forfeiture*

[16] Section 848(a)(2) prescribed the property subject to forfeiture in fairly general terms. It provided:

> Any person who is convicted under paragraph (1) of engaging in a continuing criminal enterprise shall forfeit to the United States—
>
> (A) the profits obtained by him in such enterprise, and
>
> (B) any of his interest in, claim against, or property or contractual rights of any kind affording a source of influence over, such enterprise.

Hernandez contends that section 853(a)(1) expanded the category of property that could be reached. That section provides that the property subject to forfeiture is:

> (1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation;

Although this specification of property subject to forfeiture is more precise, it does not expand the property reachable but merely defines it more accurately. The property described in section 853(a)(1) fits within the general description of the property subject to forfeiture in the former section 848(2).

[17] A second argument advanced by Hernandez is that section 853(c) expands the category of forfeitable property. That section provides, in essence, that all interest in forfeitable property as described in section 853(a) vest in the United States upon the completion of the act giving rise to forfeiture and that a subsequent transfer of the property to another person may be subject to forfeiture. However, the section also

provides for a method by which a third party, who holds an interest in the property, can establish at a subsequent hearing his or her interest in that property. Inasmuch as this section only reaches the forfeitable property as described in section 853(a), Hernandez' argument really only pertains to the interest of a third party. Hernandez has no standing to complain of any due process violation with regard to a third-party interest. That would be for the third party to contest if the occasion arises. We find no constitutional or statutory violation in the application of section 853 in this forfeiture proceeding.

2. *Burden of Proof Applicable*

[18] Hernandez contends that the instruction given by the court erroneously required the Government to establish the forfeiture by a preponderance of the evidence. The pertinent portions of section 853 here in contention are as follows:

> (a) *Property subject to criminal forfeiture*
>
> Any person convicted of a violation of this subchapter . . . shall forfeit to the United States, . . .
>
> (1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation;
>
> . . .
>
> (d) *Rebuttable presumption*
>
> There is a rebuttable presumption at trial that any property of a person convicted of a felony under this subchapter or subchapter II of this chapter is subject to forfeiture under this section if the United States establishes by a preponderance of the evidence that—

(1) such property was acquired by such person during the period of the violation of this subchapter or subchapter II of this chapter or within a reasonable time after such period; and

(2) there was no likely source for such property other than the violation of this subchapter or subchapter II of this chapter.[9]

The pertinent portion of the instructions in issue here are:

> Now if you find the defendant guilty of Count Eight of the indictment you must then determine which of the properties, if any, listed in Count Eight is subject to forfeiture. Forfeiture means the defendant is to be divested or deprived of his ownership or interest, if any, in property as a penalty for engaging in a continuing criminal enterprise. Property is forfeitable if the Government proves by a preponderance of the evidence that the property was acquired by the defendant while he engaged in the continuing criminal enterprise, Count Eight, or within a reasonable time after, and with money or proceeds obtained directly or indirectly from the continuing criminal enterprise with no other likely source for obtaining such property.

This instruction combined, in a meaningful way, the presumption and the ultimate factual determination. If the jury found the predicate facts of section 853(d), it also had to be convinced by a preponderance of the evidence of the ultimate

[9]Although section 853(a) delineates other categories of property subject to forfeiture in subsections (2) and (3), these sections are not an issue in this case because the instructions of the court limited the property subject to forfeiture to the property described in section 853(a)(1).

factual determination prescribed in section 853(a)(1), that the property be obtained directly or indirectly from the continuing criminal enterprise.

Further instructions defined preponderance of the evidence and cautioned the jury not to confuse the burdens of proof in this case. The court emphasized that when analyzing and discussing the guilt or innocence of the defendant charged in the four counts of the indictment, the Government must prove the defendant guilty beyond a reasonable doubt and that the only time the preponderance of the evidence standard was to come into play was with regard to this forfeiture provision.

[19] Judge Weis, in a carefully reasoned Third Circuit opinion, *United States v. Sandini*, 816 F.2d 869, (3d Cir. 1987), reviewed the origins of this criminal forfeiture provision and the distinction between criminal and civil forfeiture. The opinion dealt with the precise problem raised here, and held that the applicable burden of proof for the forfeiture was proof by a preponderance of the evidence. As that court noted, it is constitutionally mandated that the elements of a crime be proved beyond a reasonable doubt, however forfeiture of property is not an element of the continuing criminal enterprise offense; it is an additional penalty prescribed for that offense. Thus, proof beyond a reasonable doubt is not constitutionally mandated. The wording of section 853(a) itself makes it clear that forfeiture is a part of the punishment and not an element of the crime. The provision states: "The court, in imposing sentence on such person, shall order, in addition to *any other sentence* imposed . . . that the person forfeit to the United States all property described in this subsection." (Emphasis added.) It is clear that the statutory formulation provides that the forfeiture is additional punishment for the crime, not an element of the crime.

Hernandez argues that even if the preponderance of the evidence standard is constitutionally permissible, section 853

did not provide that the ultimate burden of proof for the forfeiture was to be by a preponderance of evidence, but only that subsection (d) provided for a rebuttable presumption, which could be established by a preponderance of the evidence. The *Sandini* court considered and rejected this argument. *Id.* at 875. We agree.

Section 853 does not specifically state what the ultimate burden of proof is to be. It would make little sense, however, to provide for a rebuttable presumption that certain property is subject to forfeiture if facts relative to that property are established by a preponderance of the evidence, then move to a beyond-the-reasonable-doubt standard before the property could be forfeited. If the presumption is to mean anything, it must mean that if the presumption is not rebutted, then the forfeiture is established. The presumption would have no significance whatsoever if the prosecution were still required to prove the forfeiture beyond a reasonable doubt. As the *Sandini* court noted,

> The legislative history makes clear that Congress sought to make the Government's burden of proof in criminal forfeitures the same as that in the civil realm. Such a provision is valid to the extent that the forfeiture proceeding occurs only after a conviction based on the constitutional standard. The statute, moreover, does not shift the burden of persuasion—it remains with the prosecution. *Id.* at 876.[10]

[10]The *Sandini* case was cited with approval and followed in *United States v. Haro*, 685 F. Supp. 1468 (E.D. Wis. 1988). In another district court case, *United States v. Pryba*, 674 F. Supp. 1518, 1520-21 (E.D. Vir. 1987), the court disagreed with *Sandini*'s reading of the legislative history. The principal criticism is that the legislative history cited the Supreme Court's decision in *Ulster County Court v. Allen*, 442 U.S. 140 (1979), as support for the provision. The *Pryba* court stated that *Allen* held that a rebuttable presumption is constitutionally acceptable so long as the device does not undermine the factfinder's responsibility at trial to find the ulti-

3. Conflict with Fed. R. Civ. P. 31(e)

Hernandez next argues that the instruction is in conflict with Rule 31(e) of the Fed. R. Crim. P. and the commentary thereon. Subsection (e) to Rule 31 was added as an amendment in 1972 to provide a procedure for the forfeiture provisions of the various criminal laws. That section states:

> If the indictment or the information alleges that an interest or property is subject to criminal forfeiture, a special verdict shall be returned as to the extent of the interest or property subject to forfeiture, if any.

We find no inconsistency between the instructions given, which were derived from section 853(c), and Rule 31(e). The "extent of the interest or property subject to forfeiture," which is to be found in a special verdict, under Rule 31(a) would, under section 853(c) and the instruction, be the forfeitable property in which Hernandez had an interest. The right, if any, of third parties to the property can be established in a subsequent hearing.

A second problem raised by Hernandez in connection with Rule 31(e) is the commentary, which provides: "The assumption of the draft is that the amount of the interest or property subject to criminal forfeiture is an element of the offense to be alleged and proved." First we note that is merely an assumption of the advisory committee and does not form any part of the rule. Enactment of section 853 clarifies congressional

---

mate facts beyond a reasonable doubt. However, the *Allen* case was dealing with the establishment of elements of a crime. Thus, it is plain that the ultimate standard had to be proof beyond a reasonable doubt. The purpose for which the *Allen* case was cited in the legislative history was the discussion at 442 U.S. 157, that the rebuttable nature of the presumption leaves the trier of fact free to credit or reject the inference and does not shift the burden of proof. Thus, the point is that a rebuttable presumption is permissible whereas a conclusive presumption would not be.

intent that the forfeiture is not an element of the crime but rather a part of the punishment and thus the assumption in the commentary is simply incorrect.

IV.

ADMISSIBILITY OF MIRANDA TESTIMONY

As a witness for the Government, Jose Miranda testified at trial about his involvement with Hernandez' drug trafficking operation during the 1970s. According to Miranda, the two men met in the early seventies when Miranda, a construction worker, did some remodeling work for Hernandez in Tucson, Arizona. Miranda soon became an errand boy for Hernandez, delivering samples to interested parties and cleaning the marijuana residue from vehicles. By the mid-seventies, he was driving loads of marijuana at Hernandez' request. Miranda further testified that, during the latter half of the decade, he broke off his relationship with Hernandez for several years. He did, however, agree to transport one final load of marijuana in the late seventies. Pursuant to this agreement, he flew to Los Angeles with Hernandez, later driving the marijuana back to Tucson in a U-Haul truck.

At trial, Hernandez objected to the admission of Miranda's testimony on the ground that it was irrelevant to the offenses for which he was being tried. He now reiterates this claim on appeal. We review a district judge's determinations regarding the admissibility of evidence for abuse of discretion. *See United States v. Hernandez*, 876 F.2d 774, 777 (9th Cir. 1989) (citing *United States v. Gwaltney*, 790 F.2d 1378, 1382 (9th Cir. 1986), *cert. denied*, 479 U.S. 1104 (1987)).

Hernandez' relevancy challenge is easily resolved. One of the crimes for which he was tried was engaging in a continuing criminal enterprise in violation of 21 U.S.C. § 848. As we have previously stated, in order to establish a violation of section 848, the Government must prove that a defendant has

committed a continuing series of narcotics violations. *See* section IIIA, *supra*. Although Hernandez' drug-related exploits from the 1970s were not specifically listed in the indictment as potential CCE predicate offenses, this court has held that narcotics violations need not be expressly mentioned in an indictment before they can be considered by the jury to satisfy section 848's continuing series requirement. *See Sterling*, 742 F.2d at 526. In *Sterling*, for instance, the defendant was charged with numerous drug-related offenses stemming from his participation in a large scale marijuana smuggling operation centered in Bellingham, Washington during 1981. Although the indictment focused on the Bellingham incident and the majority of the evidence at trial consisted of testimony of individuals involved in that scheme, government witnesses also testified about the defendant's involvement in other drug operations dating back to 1971. *Id.* at 523. We concluded that it was entirely proper for the jury to consider the defendant's earlier drug activities when determining whether section 848's continuing series requirement had been met. *Id.* at 526.

We see no meaningful difference between the facts of *Sterling* and the circumstances of this case. The district court did not abuse its discretion when it admitted the testimony of Jose Miranda.

V.

JURY CONSIDERATION OF EXTRINSIC MATERIAL

On August 20, 1986, a jury found Hernandez guilty on all counts. Hernandez now urges that the jury's verdict was tainted by the jurors' exposure to extrinsic matters during the course of their deliberations. First, Hernandez maintains that the jurors were improperly influenced by a "sign from God." Second, Hernandez claims that the jurors' inadvertent receipt in the jury room of some notes implicating him in the death

of his girlfriend irrevocably prejudiced the verdict. We reject each of these claims.

A. *Sign from God*

After the verdict was returned, Hernandez filed a motion for new trial based upon the affidavit of Audrey Giles, one of the jurors in the case. In her affidavit, Giles states that on the final morning of the jury's deliberations one of the other jurors commented that she hoped a third, unnamed juror would wear his blue blazer that day. After the jury reached its verdict, Giles was told the following: (1) that one of the jurors had prayed to God that another juror, Walter Geudtner, would change his vote from not-guilty to guilty; (2) that this juror had asked for and received a sign from God that her prayers had been heard and that Mr. Geudtner would change his vote; and (3) that the sign would be that Mr. Geudtner would be wearing his blue blazer to court on a particular day. Hernandez claims that the introduction of this "sign from God" into the jury deliberations impermissibly tainted the verdict. He asked for an evidentiary hearing so that this matter could be explored further, but the district court denied his request.

"A defendant is entitled to a new trial when the jury obtains or uses evidence that has not been introduced during trial if there is 'a reasonable possibility that the extrinsic material *could* have affected the verdict.'" *Dickson v. Sullivan*, 849 F.2d 403, 405 (9th Cir. 1988) (quoting *Marino v. Vasquez*, 812 F.2d 499, 504 (9th Cir. 1987) (emphasis in *Marino*). Rule 606(b) of the Federal Rules of Evidence, however, prohibits the use of juror testimony to impeach a verdict when that testimony relates to *intrinsic* matters—that is, the internal, mental processes by which the verdict was reached. *See Tanner v. United States*, 483 U.S. 107, 116-127 (1987).[11]

[11]Rule 606(b) provides:

Whether the juror was literally inside or outside the jury room when the irregularity occurred has no bearing on the determination that a particular influence was external or internal. *Id.* at 117.

In the present case, the district court did not err in refusing to hold an evidentiary hearing on the sign-from-God matter. All that has been alleged is that one of the jurors used prayer and a belief in a sign from God as part of her mental process. Nothing in the declaration indicates that any of the other jurors were told or became aware that a sign from God would be manifested in one juror's wearing a blue blazer while they were still deliberating. Thus, the affidavit does not establish that the verdict was improperly influenced by an extrinsic matter. In such circumstances, an evidentiary hearing was unnecessary.

B. *The Rush Notes*

Hernandez contends that he should be granted a new trial on the ground that the jury considered notes that were not part of the record and contained prejudicial information about him. This contention has no merit.

Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

On the third day of deliberations, the jury sent a note to the judge asking whether they were allowed to consider certain documents that were not discussed in court. The documents consisted of several pages of handwritten notes made by one of the government's witnesses, Olga Rush, in preparation for testifying at the trial. The notes created a possible inference that Hernandez could have been implicated in the death of his former girlfriend, Rosemary Rosales.[12] Early in the trial, the judge had specifically ruled that no evidence was to be presented regarding Rosales' death.

Upon determining that the documents about which the jury had inquired were not properly before the jury, the judge instructed the jury, "To the extent that any of you have looked at [this document], at this time I'm ordering that that will be stricken from the record. I admonish you to disregard any of that information. It has no relevance whatever to any issue before the jury." The judge denied Hernandez' motion for a mistrial. The jury then continued its deliberations for a few more hours before returning a guilty verdict. Hernandez renewed his motion for a mistrial, which the court denied.

This court reviews de novo a trial court's refusal to grant a mistrial, being mindful of the trial court's conclusion about the effect of extrinsic evidence seen by the jury. *United States v. Brodie*, 858 F.2d 492, 495 (9th Cir. 1988). "A defendant is entitled to a new trial when the jury obtains or uses evidence that has not been introduced during trial if there is 'a reasonable possibility that the extrinsic material *could* have affected the verdict.' " *Dickson v. Sullivan*, 849 F.2d 403, 405 (9th Cir. 1988) (quoting *Marino v. Vasquez*, 812 F.2d 499, 504 (9th Cir. 1987). The state has the burden of proving that

[12]The following portions of the notes are relevant:

> "ROSEMARY LOUISA ROSALES . . . BORN 6-3-52, DIED 9-3-81 . . . . Was murdered in Monterey Park on Sepember 3, 1981. . . . Jan. 1979 Rosemary came back talked about almost being killed in Mexico by Don [Hernandez] and him having a hole dug for her."

the exposure to the evidence was harmless beyond a reasonable doubt. *Dickson*, 849 F.2d at 406.

There are several factors which have been identified as relevant to determining whether the state has successfully rebutted the presumption of prejudice arising from the introduction of extrinsic evidence. *Id.* They are:

> (1) whether the material was actually received, and if so, how; (2) the length of time it was available to the jury; (3) the extent to which the juror discussed and considered it; (4) whether the material was introduced before a verdict was reached, and if so at what point in the deliberations; and (5) any other matters which may bear on the issue of the reasonable possibility of whether the extrinsic material affected the verdict.

Id. (quoting *Marino*, 812 F.2d at 506). No one of these factors is dispositive in any given case. *Id.*

This court has also noted in the past that reversible error has been found where there is a direct and rational connection between the extrinsic evidence and a prejudicial jury determination, and where the material considered by the jury relates to a material aspect of the case. *Marino*, 812 F.2d at 506; *United States v. Bagnariol*, 665 F.2d 877, 885 (9th Cir. 1981), *cert. denied*, 456 U.S. 962 (1982). We have also considered whether curative instructions were given, noting that although we ordinarily assume that such an instruction will insure that the inadmissable evidence will not influence the jury, that assumption is subject to serious doubt where the extrajudicial statement concerns a defendant's prior criminal acts. *See Dickson*, 848 F.2d at 408. Finally, we have considered the length of jury deliberations before and after the extrinsic evidence was considered. *See Marino*, 812 F.2d at 506.

In the case before us, it is not entirely clear that any of the jury members actually considered or was even aware of the contents of the notes. By bringing the notes to the court's attention, they policed themselves so as to minimize their exposure to extrinsic evidence. Furthermore, the contents of the notes were not relevant to any issue in the case before the jury. Finally, the judge gave a curative instruction immediately upon determining that extrinsic evidence had been in the jury room and before the jury continued its deliberations. These factors combined lead us to conclude that there is no reasonable possibility that the jury's verdict was influenced by their exposure to the extrinsic evidence.

VI.

RECUSAL

Prior to trial, the Government moved to detain Hernandez on the ground that his continued liberty posed a danger to the community. While this motion was pending, an unidentified individual—affiliated with neither the defendant nor the Government—contacted District Judge Irving with information regarding Hernandez' dangerousness. Although the judge informed the parties that he had been contacted, he refused to disclose the substance of the interview. Instead, he placed the evidence under seal.

Hernandez moved to disqualify Judge Irving from further involvement in the case based upon the judge's *ex parte* receipt of this potentially prejudicial information. Judge Irving concluded, however, that the circumstances did not warrant his recusal. We review this decision for abuse of discretion. *See United States v. Hamilton*, 792 F.2d 837, 839 (9th Cir. 1986).

Recusal is appropriate pursuant to 28 U.S.C. §§ 144, 455 if "a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be

questioned." *United States v. Studley*, 783 F.2d 934, 939 (9th Cir. 1986) (citations omitted). In order to state a successful case for recusal, however, a party must allege bias or prejudice stemming from an extrajudicial source. *Id.*; *Nilsson, Robbins, Dalgarn, Berliner, Carson & Wurst v. Louisiana Hydrolec*, 854 F.2d 1538, 1548 (9th Cir. 1988) [hereinafter *Nilsson*]. Further, the bias or prejudice must "result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." *United States v. Azhocar*, 581 F.2d 735, 739 (9th Cir. 1978) (emphasis and citation omitted), *cert. denied*, 440 U.S. 907 (1979). Hernandez' allegations fail to meet either of these threshold requirements.

District courts have the inherent power to receive *in camera* evidence and place it under seal in appropriate circumstances. *See United States v. Mann*, 829 F.2d 849, 853 (9th Cir. 1987). The district judge received the information as relevant to the bail proceedings that were properly pending before him. His decisions regarding how the matter should be handled and the extent to which the evidence should be relied upon were all made during the course of these proceedings and were thus judicial acts. *Compare Nilsson*, 854 F.2d at 1548 ("[t]he grounds alleged by defendants are not extrajudicial since they involve the judge's performance while presiding over the case").

Moreover, Hernandez has pointed to no particular actions of the judge to support his allegations of bias except the district judge's sentencing decision. We find Hernandez' argument that his sentence was improperly influenced meritless,[13]

[13]Hernandez was sentenced to 40 years on the CCE charge and received concurrent 5, 15, and 5-year terms on the three conspiracy charges. He claims that the magnitude of this sentence shows that the trial judge was prejudiced against him by the *in camera* information the judge considered during the course of his bail proceedings. We note first that the sentence was within the statutory limits *See United States v. Stewart*, 820 F.2d 1107,

and will not infer bias simply on the basis of the judge's exposure to potentially inflammatory information. In *United States v. Lee*, 648 F.2d 667, 669 (9th Cir. 1981), the appellant argued that the trial court's *in camera* exposure to "volatile and inflammatory" documents must necessarily have affected the district court's sentencing decision. We dismissed the argument, stating: "The very nature of the judicial function calls upon judges to rise above impermissible influences." *Id.* Our review of the record indicates nothing other than that the district judge did so in this case. Refusal to grant Hernandez' recusal motion was not an abuse of discretion.

VII.

DOUBLE JEOPARDY

[20] The court imposed concurrent sentences for the two drug conspiracy charges and the CCE charge. The appellant contends that the double jeopardy clause precludes the imposition of these concurrent sentences. In *United States v. Burt*, 765 F.2d 1364, 1368 (9th Cir. 1985), we considered the lesser included offense implications involved in conspiracy charges under section 846, and the CCE charge under section 848. We discussed the result of the Supreme Court's decision in *Jeffers v. United States*, 432 U.S. 137 (1977), and the later case of *Garrett v. United States*, 471 U.S. 773 (1985). In *Burt*, we vacated the section 846 conspiracy sentences which ran

---

1108 (9th Cir. 1987) (a sentence within the statutory limits is generally not subject to appellate review), *cert. denied*, 108 S. Ct. 192 (1987); *see also* 21 U.S.C. § 848 (authorizing life imprisonment). In addition, others have been sentenced to comparable or even harsher penalties in similar circumstances. *See, e.g., Stewart*, 820 F.2d at 1107-08 (defendant sentenced to life without possibility of parole on CCE charge); *Sterling*, 742 F.2d at 523 (40 years without the possibility of parole). Given the evidence presented at trial, Judge Irving's sentencing decision suggested no impermissible prejudice.

consecutively to the section 848 CCE sentence. It is clear from *Jeffers* that Congress did not intend to allow cumulative punishment for violations of section 846 conspiracies and the greater offense of a section 848 CCE violation. *Jeffers*, 432 U.S. at 155. The remedy required is for the district court to vacate the convictions under Counts One and Two for the conspiracies in violation of section 846. Once it is determined that Congress did not intend cumulative punishment for the section 846 violations and the section 848 violation, the only remedy consistent with the congressional intent is for the sentencing court to vacate the convictions for the lesser offenses. *Ball v. United States*, 470 U.S. 856, 864-65 (1985).[14] The fact that the sentences for these offenses were to be served concurrently with the CCE sentence still constitutes cumulative punishment. "The separate *conviction*, apart from the concurrent sentence, has potential adverse collateral consequences that may not be ignored." *Id.* at 865.

Conclusion

The conviction and the forfeiture under the CCE charge in Count One is affirmed. The conviction for conspiracy to travel in interstate and foreign commerce in aid of a recapturing enterprise, Count Three, is also affirmed. The case is remanded for vacation of the convictions under Counts One and Two, for conspiracies in violation of section 846.

AFFIRMED IN PART and REMANDED.

[14]Although the *Burt* decision required only vacation of the sentences, the Supreme Court in its *Ball* decision, decided the same year, requires vacation of the convictions.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
Plaintiff-Appellee,	)	No. 86-5320
	)	
v.	)	D.C. No. CR-85-0536-1-JLI
	)	
DONACIANO HERNANDEZ-ESCAREGA,	)	
	)	
Defendant-Appellant.	)	ORDER
	)	

Appeal from the United States District Court
for the Southern District of California

Before: HUG, KOZINSKI, and NOONAN, Circuit Judges.

The panel, as constituted in the above case, has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the en banc suggestion and no active judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

LAW OFFICES OF
BARRY TARLOW

Attorneys at Law
9119 Sunset Boulevard
Los Angeles, California 90069

(213) 278-2111

Attorneys for Defendant-Appellant
DONACIANO HERNANDEZ-ESCARCEGA

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. DONACIANO HERNANDEZ-ESCARCEGA, Defendant-Appellant.	C.A. No. 86-5320 APPELLANT'S MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF

This case was argued before Judges Proctor Hug, Jr., Alex Kozinski and John T. Noonan on February 5, 1988 and is presently under submission. By this motion, Appellant seeks leave of court to file a supplemental brief on one of the issues raised in the appeal.

Appellant contends that the district court erred in rejecting an instruction which would have required the jury to agree unanimously on the three offenses comprising the "series of violations" element of the continuing criminal enterprise offense. Appellant's claim

of error is based in part on this court's recent decision in United States v. Gilley, C.A. No. 86-1174 (9th Cir., Jan. 11, 1988).[1]

During oral argument, Judge Noonan asked several questions about the unanimity issue and the Gilley decision. Among other things, Judge Noonan inquired whether the jury reasonably could have disagreed over the specific offenses comprising the continuing series of violations.[2]

To answer Judge Noonan's question, it is necessary to examine carefully the evidence presented in support of each "continuing series" offense alleged by the prosecution. Because of the number of issues raised in this appeal, and the timing of the Gilley decision, the briefs do not address this issue in sufficient detail. Counsel stated their respective positions during oral

---

[1]Gilley was decided after the briefs in this case had been filed. In a letter to the court dated January 20, 1988, counsel cited Gilley as supplemental authority pursuant to Federal Rule of Appellate Procedure 28(j).

[2]In Gilley, the court reversed the defendant's conviction under the illegal gambling business statute, 18 U.S.C. § 1955, because the district court did not instruct the jury that it must agree unanimously on the 30-day period element of the offense. Although the defense did not request such an instruction, the court concluded that its omission constituted plain error under the circumstances of the case. In that connection, the court noted that a genuine possibility of juror confusion existed because the evidence did not unequivocally show that the requisite five people were involved in the gambling enterprise during the entire period of time embraced by the indictment. Therefore, it was possible that some jurors based their finding of guilt on one 30-day period while others focused on a different 30-day period.

argument,[3] but time constraints made it impossible to discuss the relevant evidence and to respond meaningfully to Judge Noonan's question. Appellant respectfully requests an opportunity to analyze the Gilley issue in a supplemental brief.

If supplemental briefs are ordered, Appellant will be able to analyze the trial evidence and demonstrate to the court that jurors could reasonably have disagreed over which of the "continuing series" offenses alleged in count eight were actually committed. As set forth below, the credibility and probative force of the evidence introduced in support of many of the offenses is open to serious question.

Count eight identifies 11 separate offenses which comprise the continuing series of violations.[4] Offenses (3) and (4) charge importation and possession with intent to distribute approximately 2,000 pounds of marijuana

---

[3]Government counsel argued that this was essentially an "all or nothing" case in which Appellant did not challenge the sufficiency of the evidence with respect to any particular "continuing series" offense, but simply disavowed involvement in any of the offenses. Defense counsel argued that specific offenses were challenged through cross-examination and the presentation of contradictory evidence, and that jurors could have disagreed over whether individual "continuing series" offenses had occurred.

[4]A copy of the Continuing Criminal Enterprise count is attached as Exhibit "A" to this motion. Offenses (1) and (2) of the continuing series of violations incorporate by reference the conspiracies charged in counts one and two of the indictment. Since the jury convicted Appellant on both conspiracy charges, there is no unanimity problem with respect to these offenses if conspiracies can properly be considered as predicate felonies for a § 848 violation. Appellant contends that they cannot. See Appellant's Opening Brief at 40. Since the indictment does not separately charge Appellant with any other Title 21 felony, it is impossible to determine from the verdict itself whether the jury unanimously agreed on the third offense comprising the continuing series.

on October 23, 1983. The details of these offenses are set forth in overt acts 5 through 12 of the conspiracy counts which are incorporated by reference.[5]

The evidence in support of offenses (3) and (4) included testimony from two informant witnesses, James and Annette Powell. The Powells did not participate in the October 23rd transaction and their testimony was based upon statements allegedly made by Frank Peacock during a meeting at Peacock's house [R.T. 825-27; 1273-74].[6] According to the Powells, Peacock said that he had flown a plaaneload of marijuana to California from Mexico; that the plane was damaged during the landing; that he and James Wheaton removed the marijuana and loaded it into a van; that the two men set fire to the crippled plane; and that Wheaton then delivered the van to a warehouse in Montebello or Long Beach [R.T. 825-27; 1273-74]. During cross-examination, James Powell acknowledged that Peacock's version of these events "sounds impossible" [R.T. 1422-23].

San Bernardino County deputy sheriff Robert Smith testified that he found a damaged Cessna 402, #522LL,

---

[5]Offense (3) of the continuing series charges: "On or about October 23, 1983, possession of approximately 2,000 pounds of marijuana with intent to distribute, as set forth in overt acts 5, 6, 7, 8, 9, 10, 11 and 12." Offense (4) charges: "on or about October 23, 1983, importation of marijuana, as set forth in overt acts 5, 6, 7, 8, 9, 10, 11 and 12." The same pleading format is used throughout the "continuing series" allegation of count eight. A copy of the conspiracy counts' overt act allegations is attached as Exhibit "B" to this motion.

[6]The defense vigorously attacked the credibility of the informant witnesses and the hearsay declarant. See Appellant's Opening Brief at 4-5, 35-6. However, the district court denied a defense instruction explaining how the jury should consider impeachment evidence offered against non-testifying declarants. See Appellant's Opening Brief at 35-7.

in the desert near Twentynine Palms on October 2, 1983 [R.T. 1064]. The date of Smith's observations and the number on the Cessna aircraft do not correspond to the allegations of the indictment.[7]

The government also called James Wheaton as a witness, but did not question him about offenses (3) and (4). However, on cross-examination, Wheaton testified that he did not participate in the marijuana transactions alleged in these offenses. In that connection, Wheaton specifçally denied the allegations in overt acts 9 through 12 that he unloaded the marijuana, assisted in burning the plane, and delivered the van load of marijuana to Appellant [R.T. 557-59].

Offenses (5) and (6) of the continuing series of violations charge importation and possession with intent to distribute approximately 2,600 pounds of marijuana between November and December 1983. These offenses incorporate by reference overt acts 17 through 19 of the conspiracy counts.

The evidence in support of offenses (5) and (6) consisted solely of the testimony of James Powell. Powell stated that he and James Wheaton met a plane and unloaded marijuana, and that Wheaton drove the marijuana to a warehouse in Long Beach. Powell's testimony did not include any dates or other details to tie this incident to offenses (5) and (6).

Powell's testimony was contradicted by James Wheaton. Wheaton testified that he participated in only one transaction involving a 900 pound load of marijuana, and that he drove a van containing this marijuana to

---

[7]Count eight alleges that offenses (3) and (4) occurred on or about October 23, 1983. The overt acts incorporated by reference in these offenses refer to a Cessna aircraft FAA #N5211

a parking lot in Long Beach and left it there [R.T. 553-57].

Offenses (7) and (8) charge importation and possession with intent to distribute approximately 1,300-1,500 pounds of marijuana in December 1983. These offenses incorporate by reference overt acts 20 through 24 of the conspiracy counts. Once again, James Powell was the principal witness with regard to these offenses [R.T. 1257-58; 1276-84].[9] A second informant, Michael English, provided limited corroboration of Powell's testimony [R.T. 592-96].[9]

Offenses (9) and (10) of the continuing series of violations charge importation and possession with intent to distribute approximately 1,300-1,500 pounds of marijuana on December 21, 1983. These offenses incorporate by reference overt acts 26 and 29 through 38 of the conspiracy counts.

The government's evidence in support of these two offenses was stronger. Michael English and James Powell testified about this marijuana flight [R.T. 607-33; 1284-90] and their testimony was corroborated by police officers who observed the plane before and after the flight [R.T. 388; 392-93; 414-22].[10]

Offense (11) of the continuing series charges possession with intent to distribute approximately 1,300 pounds of marijuana on March 4, 1984. This offense incorporates

---

[9]Powell's version of the events surrounding this transaction was impeached during cross-examination [R.T. 1435-37].

[9]English stated that he and Frank Peacock flew in a planeload of marijuana in December 1983 and that James Powell unloaded it [R.T. 592-96].

[10]The officers' testimony did not corroborate the informants' claim that Appellant was involved in this planeload of marijuana.

by reference overt acts 52 through 54 of the conspiracy counts.

Through the testimony of various police officers, the government clearly established that a van containing 1,300 pounds of marijuana was seized on March 4, 1984 and that the plane referred to in the overt acts was searched and found to contain marijuana debris [R.T. 397; 405-06; 407-12; 1055-63]. However, the evidence linking Appellant to this transaction was extremely tenuous.

A third informant witness, William Alongi, related a co-conspirator conversation with James Gahan which occurred during the second week of March 1984. During that conversation, Gahan told Alongi that a plane had been confiscated and some marijuana lost. Although Gahan had identified "Don" in Montebello as his source of marijuana, his statements to Alongi did not specifically link Appellant to the transaction involved in offense (11). No other evidence was presented to establish that Appellant was involved in the March 4, 1984 transaction.[11]

In addition to the eleven offenses specifically identified in count eight, the district court admitted the testimony of prosecution witness Jose Miranda as proof of the continuing series of violations [R.T. 1649-59].[12] Miranda's testimony related to alleged marijuana

---

[11]James Gahan did not testify at the trial and William Alongi's testimony was admitted pursuant to the co-conspirator hearsay rule. Alongi's credibility was severely challenged during cross-examination [R.T. 1151-1233] and through the introduction of adverse character evidence [R.T. 2059-67].

[12]This testimony was admitted over defense objection. Appellant contends that the district court erred in admitting Miranda's testimony. See Appellant's Opening Brief at 26-7.

activities with Appellant during the early to mid-1970's [R.T. 1655-71; 1694-96].

The defense challenged Miranda's credibility on cross-examination [R.T. 1676-98] and presented two witnesses who directly refuted Miranda's claim that Appellant had stored a large quantity of marijuana at a residence on Hershey Street in Rosemead [R.T. 2315-23 (testimony of Benito Camacho); R.T. 2324-28 (testimony of Dale Rogers)].

It is clear from this summary that the evidence presented by the government in support of individual "continuing series" offenses was far from unequivocal. Under these circumstances, a reasonable possibility exists that jurors could have disagreed over the third offense included in the continuing series of violations element of count eight. Appellant respectfully requests leave of court to analyze this issue in detail in a supplemental brief.

DATED: February 18, 1988

Respectfully submitted,

LAW OFFICES OF BARRY TARLOW
Mark O. Heaney
Attorneys for Defendant-Appellant
Donaciano Hernandez-Escarcega

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on March 5, 1990, I served the within *Petition for Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.W.
Washington, D.C. 20543
(By Express Mail: original and forty copies)

Solicitor General
Department of Justice
Washington, D.C. 20530

Roger Haines
Assistant U.S. Attorney
U.S. Courthouse
940 Front Street
Room 5-N-19
San Diego, California 92189

I declare under penalty of perjury that the foregoing is true and correct. Executed on March 5, 1990, at Los Angeles, California.

Betty J. Malloy
(Original signed)

No. 89-1413

In the Supreme Court of the United States

OCTOBER TERM, 1989

DONACIANO HERNANDEZ-ESCARSEGA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General
EDWARD S.G. DENNIS, JR.
Assistant Attorney General
JOSEPH C. WYDERKO
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether petitioner is entitled to a new trial because one juror believed she was sent a "sign from God" that a second juror would change his vote from not guilty to guilty.

2. Whether the district court's failure to instruct the jury that it had to agree unanimously on the drug offenses constituting a continuing criminal enterprise was reversible error.

3. Whether a 1984 amendment to the drug criminal forfeiture statute, 21 U.S.C. 853(d), establishes a preponderance of the evidence standard.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, statutes and rule:

Statutes and rule—Continued: Page

In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1413

DONACIANO HERNANDEZ-ESCARSEGA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A5-A50) is reported at 886 F.2d 1560.

JURISDICTION

The judgment of the court of appeals was entered on October 4, 1989. A petition for rehearing was denied on January 5, 1990. Pet. App. A51. The petition for a writ of certiorari was filed on March 7, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of California, petitioner was con-

victed of conspiracy to import marijuana, in violation of 21 U.S.C. 963; conspiracy to possess marijuana with intent to distribute it, in violation of 21 U.S.C. 846; conspiracy to travel in interstate and foreign commerce in aid of a racketeering enterprise, in violation of 18 U.S.C. 371 and 1952(a)(3); and engaging in a continuing criminal enterprise (CCE), in violation of 21 U.S.C. 848. Petitioner was sentenced to 40 years' imprisonment on the CCE count and was ordered to forfeit various properties. On the conspiracy counts, petitioner was sentenced to concurrent terms of 5, 15, and 5 years' imprisonment and was fined $100,000.

1. The evidence at trial showed that petitioner was the kingpin of a large-scale scheme to smuggle marijuana into the United States from Mexico.[1] On four occasions, petitioner arranged for pilots to fly to Mexico to pick up shipments of marijuana. The marijuana was stored in two warehouses in California prior to distribution. On a fifth occasion, petitioner arranged a marijuana shipment within the United States.

Frank Peacock and Robert Meyer flew to Mexico in October 1983 to pick up the first shipment of marijuana for petitioner. Peacock and Meyer landed at the wrong airport, however, and were arrested by Mexican police. Petitioner paid $1 million to the Mexican police to obtain the release of the two men and the plane. Peacock and Meyer then flew back to California and crash-landed in a desert area. Gov't C.A. Br. 3-4.

Peacock hired James Wheaton to assist in transporting the second shipment of marijuana. After discussing the shipment with petitioner, Peacock flew a plane loaded with 900 pounds of marijuana from Mexico to a desert landing strip

---

[1] The opinion of the court of appeals does not contain a complete summary of the evidence at trial. This statement of facts is based on the government's brief filed in the court of appeals.

near Danby, California. The marijuana was loaded into a van owned by Peacock and driven by Wheaton to a Long Beach, California parking lot. Gov't C.A. Br. 4.

In December 1983, Peacock and a second pilot, Michael English, flew two separate planes to Caborca, Mexico, where a Mexican ground crew loaded 1,500 pounds of marijuana into Peacock's plane. Peacock and English flew back and landed near Danby. After the marijuana was loaded into his van, James Powell drove to a stash house, where the marijuana was unloaded into a garage. Later that night, petitioner paid Powell $3,000 cash. Gov't C.A. Br. 5-6.

The next day, English flew back to Caborca, Mexico, to pick up the fourth shipment of marijuana. Petitioner's cousin loaded 1,200 pounds of marijuana onto the plane in Caborca. English then flew to the landing strip near Danby, where he nearly crashed into some nearby oil tanks when one of the plane's engines malfunctioned. After loading the marijuana into Powell's van, English and Powell poured gasoline inside the disabled aircraft and burned it. Powell and English subsequently turned the van over to two men for delivery to a stash house. Gov't C.A. Br. 6-7. Petitioner, who had been occupied during the day in receiving a shipment of bullet-proof vests, later made cash payments of $20,000 to English and $3,000 to Powell. Gov't C.A. Br. 7-8.

Petitioner's fifth shipment was seized by police officers in March 1984 after police in a surveillance aircraft saw Peacock's plane land at the desert strip near Danby, where it was met by a van. Police officers stopped the van and found 1,300 pounds of marijuana inside it. Petitioner later told one of his distributors that the police had confiscated a load of marijuana and one of his planes in March. Gov't C.A. Br. 8-9 & nn.7, 8.

2. The CCE count of the indictment listed 11 felony offenses as constituting the "continuing series of violations" element of the CCE offense. The first felony listed was the

conspiracy to import marijuana charged in Count 1, and the second was the conspiracy to possess marijuana charged in Count 2. The next eight felony offenses alleged were paired substantive offenses of importing and possessing marijuana that corresponded to the four marijuana shipments from Mexico. The final felony listed was the substantive offense of possessing marijuana that corresponded to the fifth shipment seized by the police officers on March 4, 1984. Pet. App. A27-A29. At trial, petitioner asked the district court to give a jury instruction specifically requiring the jury to agree unanimously on the three or more felony offenses constituting the "continuing series of violations" necessary to convict on the CCE count. The district court declined to give the requested instruction. *Id.* at A27.

3. The CCE count also charged that various properties were subject to forfeiture. The district court instructed the jury that, if it found petitioner guilty on the CCE count, it was required to determine which properties were subject to forfeiture. The court further instructed the jury that a property was subject to forfeiture "if the Government proves by a preponderance of the evidence that the property was acquired by the defendant while he engaged in the continuing criminal enterprise * * *, or within a reasonable time after, and with money or proceeds obtained directly or indirectly from the continuing criminal enterprise with no other likely source for obtaining such property." Pet. App. A36-A37.

4. After the jury returned its verdict, petitioner moved for an evidentiary hearing and for a new trial based on an affidavit from Audrey Giles, one of the jurors. Giles' affidavit stated that, while sharing an elevator with juror Grantham on the final morning of jury deliberations, Giles heard Grantham comment that she hoped an unnamed juror would wear his blue blazer that day. At the time, Giles did

not know what Grantham meant by this statement. After the jury returned its verdict, however, Giles accompanied several other jurors to a restaurant. There, juror Casillas told Giles (1) that one of the other jurors had prayed to God that another juror, Walter Geudtner, would change his vote from not guilty to guilty; (2) that the juror had asked for and received a sign from God that her prayers had been heard and that Geudtner would change his vote; and (3) that the sign would be that Geudtner would be wearing his blue blazer to court that day. Pet. App. A43; Pet. 4 n.3. The district court denied the motions. Pet. App. A43.

5. The court of appeals affirmed in part and remanded for vacation of the convictions on two of the counts. Pet. App. A5-A50.[2] While observing that it would have been "the better practice" to give a specific unanimity instruction, the court concluded that "the facts support the conclusion that the jury unanimously agreed on three predicate offenses," and therefore held that the failure to give an instruction requiring the jury to agree unanimously on the three felony offenses underlying the CCE conviction was, at most, harmless error. *Id.* at A28-A29. Observing that petitioner had been separately convicted of the conspiracy to import marijuana and the conspiracy to possess marijuana that were listed as the first two predicate offenses in the CCE count, the court stated that the only question was "whether the jury unanimously agreed on at least a third violation." *Id.* at A28. "In the context of this case," the court explained, "it is inconceivable that the jurors would not have found that the[ ] substantive offenses [listed as predicate felonies in the CCE count] were not committed" because "[t]he co-conspirators involved testified in detail as to these events

[2] The court held that the imposition of concurrent sentences for the two drug conspiracy counts and the CCE count violated the Double Jeopardy Clause. Pet. App. A49-A50. Accordingly, the court remanded the case for vacation of the two drug conspiracy convictions. *Id.* at A50.

and the evidence was overwhelming." *Id.* at A29. The court noted that "[w]ith [petitioner's] conviction of the two conspiracies, all of the substantive offenses committed by his co-conspirators could be attributed to [petitioner]." *Ibid.* "Under these circumstances," the court concluded, "the jurors' unanimous agreement that [petitioner] committed at least three violations of the federal narcotics law cannot seriously be questioned." *Ibid.*

Relying on *United States* v. *Sandini*, 816 F.2d 869 (3d Cir. 1987), the court of appeals held that the jury was properly instructed to apply the preponderance of the evidence standard of proof to determine whether the properties listed in the CCE count were subject to forfeiture. Pet. App. A37-A39. The court noted that proof beyond a reasonable doubt was not constitutionally mandated because "[t]he wording of [21 U.S.C.] 853(a) itself makes clear that forfeiture is a part of the punishment and not an element of the crime." *Id.* at A38. Rejecting petitioner's argument that Section 853(d) does not prescribe a burden of proof because it is phrased in terms of a rebuttable presumption, the court observed that "[i]t would make little sense * * * to provide for a rebuttable presumption that certain property is subject to forfeiture if facts relative to that property are established by a preponderance of the evidence, then move to a beyond-the-reasonable-doubt standard before the property could be forfeited." Pet. App. A39.[3] The court

[3] 21 U.S.C. 853(d) provides:

> There is a rebuttable presumption at trial that any property of a person convicted of a felony under this subchapter or subchapter II of this chapter is subject to forfeiture under this section if the United States establishes by a preponderance of the evidence that –
>
> (1) such property was acquired by such person during the period of the violation of this subchapter or subchapter II of this chapter or within a reasonable time after such period; and
>
> (2) there was no likely source for such property other than the violation of this subchapter or subchapter II of this chapter.

explained that "[i]f the presumption is to mean anything, it must mean that if the presumption is not rebutted, then the forfeiture is established." *Ibid.*

The court of appeals rejected petitioner's claim that he was entitled to a new trial because the jury was improperly influenced by the "sign from God." Pet. App. A42-A44. It observed that "[a]ll that has been alleged is that one of the jurors used prayer and a belief in a sign from God as part of her mental process." *Id.* at A44. The court added that "[n]othing in the declaration indicates that any of the other jurors were told or became aware that a sign from God would be manifested in one juror's wearing a blue blazer while they were still deliberating." The court thus concluded that an evidentiary hearing was unnecessary because "the affidavit does not establish that the verdict was improperly influenced by an extrinsic matter." *Ibid.* The court of appeals also rejected numerous additional contentions that petitioner has now abandoned. *Id.* at A10-A27, A29-A36, A41-A42, A44-A49.

ARGUMENT

1. Petitioner presses his contention that he is entitled to a new trial because the jury's verdict was improperly influenced by consideration of a "sign from God." Pet. 4-9. The lower courts properly rejected this contention.

In *Tanner* v. *United States*, 483 U.S. 107, 116-122 (1987), the Court reaffirmed the general rule that a juror's testimony is not admissible to impeach the jury's verdict. See also *McDonald* v. *Pless*, 238 U.S. 264, 267-269 (1915); *Hyde* v. *United States*, 225 U.S. 347, 384 (1912). The rule against impeachment of jury verdicts protects "the weighty government interest in insulating the jury's deliberative process." 483 U.S. at 120. The Court in *Tanner* also reaffirmed a limited exception to the rule that applies when an external

influence is alleged to have affected the jury. *Id.* at 117-118. The Court has applied this exception in cases involving a bailiff's comment to the jury that the defendant is guilty, *Parker* v. *Gladden*, 385 U.S. 363, 363-364 (1966), a bailiff's statement that the defendant in a murder case had committed other murders, *Mattox* v. *United States*, 146 U.S. 140, 150-151 (1892), and the offer of a bribe to a juror, *Remmer* v. *United States*, 347 U.S. 227, 228-230 (1954). Both the general rule against impeachment of a jury verdict by juror testimony and the exception for external influences are reflected in Fed. R. Evid. 606(b). The Rule provides that "a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict * * * or concerning the juror's mental processes in connection therewith * * *." As an exception to that principle, however, the Rule further provides that post-verdict juror testimony is permissible to determine "whether any outside influence was improperly brought to bear upon any juror."

There is no merit in petitioner's novel contention (Pet. 6-9) that the "sign from God" to juror Grantham was an improper external influence falling within the limited exception of Rule 606(b) and *Tanner*. Despite petitioner's assertions (Pet. 7-8), the purported sign from God was not the "functional equivalent of a statement by a third party that petitioner was guilty of the crimes charged." First, juror Grantham did not ask for a sign of petitioner's guilt, and did not interpret the wearing of a blue blazer as a sign of guilt. Grantham simply prayed that another juror would change his vote to guilty, and apparently believed that she had received a sign that the juror would do so. Second, an event that a juror takes to be a sign from God is not the "functional equivalent of a statement by a third party." Prayer during jury deliberations, the determination whether

an event is a "sign" from God in answer to prayer, the ascription of meaning to such a sign, and the decision whether and how to respond to the sign, all depend entirely upon the individual juror's beliefs, attitudes, and internal mental processes. For that reason, a purported sign from God is not at all like a statement by the court bailiff. Accordingly, the court of appeals correctly held that juror testimony impeaching the verdict is inadmissible in this case.

2. Petitioner also disputes the conclusion of the court of appeals that it was at most harmless error not to instruct the jury that it had to agree unanimously on the offenses that constituted the continuing series of violations underlying the CCE count. Pet. 9-14. This fact-bound contention is without merit.

The continuing criminal enterprise statute, 21 U.S.C. 848, requires the jury to find, among other things, that a defendant has committed a felony violation of Title 21 and that "such violation is a part of a continuing series of violations" of Title 21. 21 U.S.C. 848(b)(1) and (2). Although the requirement of a "continuing series of violations" is not further defined in the statute, the courts have held that it is met by a showing of three or more felony violations of the narcotics laws. See, *e.g.*, *United States* v. *Young*, 745 F.2d 733, 747 (2d Cir. 1984), cert. denied, 470 U.S. 1084 (1985); *United States* v. *Chagra*, 653 F.2d 26, 27-28 (1st Cir. 1981), cert. denied, 455 U.S. 907 (1982).

As an initial matter, we submit that the district court was not required to give a specific unanimity instruction with respect to the offenses constituting the continuing series of violations. There is no requirement of jury unanimity "as to 'specific fact[s] underlying an element' " of the crime. *United States* v. *Jackson*, 879 F.2d 85, 87 (3d Cir. 1989) (quoting *United States* v. *Tarvers*, 833 F.2d 1068, 1074 (1st Cir. 1987)). If jurors were required to be of one mind as to the evidentiary basis for their verdict, "there would be

no principled reason not to require [a specific unanimity] instruction as to virtually every element in any conspiracy count, including the identities of co-conspirators and the overt acts." *Jackson*, 879 F.2d at 88. Accordingly, courts of appeals uniformly hold that the jury need not agree on the identities of the five or more persons supervised by the kingpin of a CCE. See *Jackson*, 879 F.2d at 86-90; *Tarvers*, 833 F.2d at 1073-1075; *United States* v. *Markowski*, 772 F.2d 358, 364 (7th Cir. 1985), cert. denied, 475 U.S. 1018 (1986). The same principles should apply to the "continuing series of violations" element of the CCE offense.[4]

Even if unanimity is required as to the crimes constituting the continuing series of violations, there was no reversible error here. The court of appeals concluded that the failure to give a specific unanimity instruction with respect to the continuing series of violations was harmless in this case because "the facts support the conclusion that the jury unanimously agreed on three predicate acts." Pet. App. A28. Petitioner was convicted on two conspiracy counts that were listed as predicate offenses in the CCE count. Thus, as the court of appeals noted, the only question was "whether the jury unanimously agreed on at least a third violation." *Ibid.* Based on its review of the record, the court found it "inconceivable" that the jurors would not have unanimously agreed that all of the other predicate offenses were com-

---

[4] In *Jackson*, the Third Circuit sought to distinguish its decision in *United States* v. *Echeverri*, 854 F.2d 638, 643 (1988), on the ground that agreement on "culpable acts" differs from agreement on "collateral or underlying facts which relate to the manner in which the culpable conduct was undertaken." 879 F.2d at 88. But the CCE statute requires both supervision of five or more persons and a continuing series of violations. There is no principled basis for requiring unanimity as to the facts underlying one element but not the other.

mitted because "[t]he co-conspirators involved testified in detail as to these events and the evidence was overwhelming." *Id.* at A29. Thus, as the court concluded, it "cannot seriously be questioned" that the jurors unanimously agreed on at least three predicate offenses in the circumstances of this case. *Ibid.* Petitioner's fact-bound objections to the court of appeals' evaluation of the record warrant no further review.[5]

3. Finally, petitioner contends that the drug criminal forfeiture statute requires proof beyond a reasonable doubt rather than proof by a preponderance of the evidence. Pet. 14-19. This contention also is without merit.

The Comprehensive Forfeiture Act of 1984, a component of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, §§ 301-317, 98 Stat. 1976, 2040-2057, amended the criminal forfeiture provisions of Title 21 by, among other things, adding 21 U.S.C. 853(d). That Section creates a rebuttable presumption that any property of a person convicted of a felony drug offense is subject to forfeiture if the government establishes "by a preponderance of the evidence" that (1) the property was acquired during the felony or within a reasonable time thereafter, and (2) there was no likely source for the property other than the drug felony.

---

[5] Petitioner incorrectly suggests (Pet. 10-13) that the decision of the court of appeals departs from *United States* v. *Echeverri*, *supra*. The decision in *Echeverri* turned on the court's fact-based determination that "individual jurors reasonably could have disagreed as to which act supported guilt." 854 F.2d at 642 (quoting *United States* v. *Beros*, 833 F.2d 455, 458 (3d Cir. 1987)). A second case cited by petitioner, *United States* v. *Gilley*, 836 F.2d 1206 (9th Cir. 1988), also rests on the fact-specific conclusion that "there [was] a genuine possibility that the jurors were not unanimous as to the conjunction of two of the material [e]lements of the crime." *Id.* at 1212.

Contrary to petitioner's contention, the court of appeals correctly concluded that Section 853(d) prescribes the government's burden of proof in a drug forfeiture proceeding as a preponderance of the evidence. The other courts of appeals that have addressed this issue have reached the same conclusion. *United States* v. *Sandini*, 816 F.2d 869, 875-876 (3d Cir. 1987); *United States* v. *Herrero*, 893 F.2d 1512, 1541-1542 (7th Cir. 1990). The appellate courts agree that "[t]he legislative history makes clear that Congress sought to make the government's burden of proof in criminal forfeitures the same as that in the civil realm." Pet. App. A39 (quoting *Sandini*, 816 F.2d at 876).[6] As the court of appeals noted, "[it] would make little sense * * * to provide for a rebuttable presumption that certain property is subject to forfeiture if facts relative to that property are established

---

[6] The appellate decisions that petitioner relies upon (Pet. 15-16) are inapposite. Two of the cases, *United States* v. *McKeithen*, 822 F.2d 310 (2d Cir. 1987), and *United States* v. *Crozier*, 674 F.2d 1293 (9th Cir. 1982), involved the predecessor drug forfeiture provision, 21 U.S.C. 848(a)(2)(B) (1982), that did not contain a preponderance of the evidence standard. The other two cases, *United States* v. *Cauble*, 706 F.2d 1322 (5th Cir. 1983), cert. denied, 465 U.S. 1005 (1984), and *United States* v. *Spilotro*, 680 F.2d 612 (9th Cir. 1982), note in passing that a forfeiture under the RICO forfeiture provision, 18 U.S.C. 1963, must be established by proof beyond a reasonable doubt. But the RICO forfeiture provision, like the predecessor to Section 853(d), does not prescribe a preponderance standard. For the same reason, petitioner cannot rely on the government's brief in opposition to the petition for a writ of certiorari in *Cauble*, or on the Department of Justice's RICO manual for federal prosecutors. See Pet. 16 n.20, 19 n.26. *United States* v. *Pryba*, 674 F. Supp. 1518, 1520-1521 (E.D. Va. 1987), also was a RICO forfeiture case. The criticism of *Sandini* by the district court in *Pryba* rests on a misunderstanding of *Ulster County Court* v. *Allen*, 442 U.S. 140 (1979). See Pet. App. A39 n.10. The court of appeals recently affirmed Pryba's conviction and the forfeitures without commenting on the burden of proof issue. *United States* v. *Pryba*, No. 88-5001 (4th Cir. Apr. 9, 1990).

by a preponderance of the evidence, then move to a beyond-the-reasonable doubt standard before the property could be forfeited" because, "[i]f the presumption is to mean anything, it must mean that if the presumption is not rebutted, then the forfeiture is established." Pet. App. A39. In the absence of a conflict among the courts of appeals, further review by this Court is not warranted.[7]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General
EDWARD S.G. DENNIS, JR.
Assistant Attorney General
JOSEPH C. WYDERKO
Attorney

MAY 1990

---

[7] Petitioner contends (Pet. 19) that retroactive application of the reduced burden of proof to properties acquired before the enactment of Section 853(d) in 1984 violates the Ex Post Facto Clause. Section 853(d) does not impose a criminal penalty for conduct that was lawful when performed, nor does it impose a harsher penalty than existed prior to passage of the amendments. The change in the statute at issue is thus a procedural change of the type that does not violate the Ex Post Facto Clause, even though it may operate to the defendant's detriment. See *Miller* v. *Florida*, 482 U.S. 423, 433 (1987); *Dobbert* v. *Florida*, 432 U.S. 282, 293-294 (1977).

☆ U.S. GOVERNMENT PRINTING OFFICE 1990—262 203/00881